

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

74-2697

In The
United States Court of Appeals
For The Second Circuit

AID AUTO STORES, INC.,

Plaintiff-Appellant,

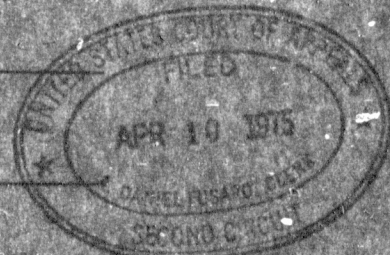
vs.

HERBERT S. CANNON and CANNON, JEROLD & CO.,
INC.

Defendants-Appellees.

*On Appeal from the United States District Court for the
Southern District of New York*

BRIEF FOR APPELLEES



THAL & YOUTT
Attorneys for Defendants-Appellees
666 Fifth Avenue
New York, New York 10019
(212) 586-3722

HARRY E. YOUTT
Of Counsel

(212)

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UNITED STATES COURT OF APPEALS

For the Second Circuit

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AID AUTO STORES, INC.,

Plaintiff-Appellant,

-against-

HERBERT S. CANNON and CANNON,
JEROLD & CO., INC.,

Defendants-Appellees.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Defendants-Appellees are not satisfied with the statement of issues submitted by plaintiff-appellant (Appellants' Brief pp 1-2), and accordingly, pursuant to Rule 28(b) of the Federal Rules of Appellate Procedure, submit that the issues presented for review on this appeal are as follows:

1. Whether, construing the trial evidence in the light most favorable to plaintiff, giving to the plaintiff the benefit of all inferences which the evidence fairly supports, a verdict was properly directed in favor of defendants Cannon and Cannon Jerold at the close

of plaintiff's evidence upon the ground that plaintiff had failed to set forth a prima facie case against said defendants on any of its claims against them; and

2. Whether the Trial Court abused its discretion in awarding costs and attorney's fees to defendants Cannon and Cannon Jerold pursuant to Section 11(e) of the Securities Act of 1933 (15 U.S.C. §77k(e)).

STATEMENT OF THE CASE

Defendants are dissatisfied with the Statement of the Case presented by plaintiff-appellant (Appellant's Brief pp 2-12) and accordingly, pursuant to Rule 28(b) of the Federal Rules of Appellate Procedure submit the following statement.

NATURE OF THE CASE

This is an appeal from the judgment entered December 13, 1974 dismissing plaintiff's complaint against defendants Herbert S. Cannon (hereafter referred to as "Cannon") and Cannon, Jerold & Co., Inc. (hereafter referred to as "Cannon Jerold"). That judgment was based upon the trial court's previous entry of a directed verdict in favor of Cannon and Cannon Jerold at the close of plaintiff's evidence at trial on November 19, 1975.

Plaintiff also appeals from the order of the Trial Court dated January 27, 1975, granted on defendants' post trial motion, awarding costs and attorney's fees to defendants Cannon and Cannon Jerold pursuant to Section 11(e) of the Securities Act of 1933 (15 U.S.C. §77k(e)). (All statutory sections referred to herein are quoted in the Statutory Addendum annexed hereto (infra pp45-53)).

Plaintiff also apparently appeals from the Court's denial (App. 69a-70a) of plaintiff's pre-trial motion filed November 18, 1974 to strike the jury demand of defendants Cannon and Cannon Jerold (See Appellant's brief, Issue (1) pp 1-2), although this point is not argued in the body of appellant's brief.

This action arises out of the purchase by plaintiff of a certificate of deposit in a bank in the Bahamas. When plaintiff was unsuccessful in retiring the certificate it filed this action against a number of defendants, including Cannon and Cannon Jerold. The theory of Cannon's liability is based upon the fact that he had loaned money to the bank for purposes of obtaining its initial charter and upon the further fact that Cannon had discussed the bank with defendant Rittmaster, then one of plaintiff's directors, prior to the purchase of the certificate. Cannon Jerold was joined as a defendant upon the claim that at all relevant times Cannon was its president and chief executive officer (Complaint App. 5a-16a). (Because the alleged liability of Cannon Jerold is premised upon the conduct of defendant Cannon, the relevant facts are frequently discussed herein without specific separate reference to Cannon Jerold).

The complaint alleges two causes of action against defendants Cannon and Cannon Jerold under the Securities Act of 1933 (First and Second Claims), one cause of action under the Securities Exchange Act of 1934 (Third Claim), one cause of action under a theory of common law fraud

(Fourth Claim), and one cause of action based upon the alleged intentional procurement of a breach of fiduciary or agency relations (Seventh Claim). Because diversity between the plaintiff and defendant Cannon Jerold did not exist, jurisdiction over the Fourth and Seventh Claim was based upon the doctrine of pendent jurisdiction.

STATEMENT OF FACTS

1. The Transaction at Issue

In this lawsuit plaintiff sought to recover against numerous defendants (based upon numerous theories of action under the Federal Securities laws, and New York State Corporate statutory and common law) for their alleged roles in causing plaintiff, in April of 1973, to purchase a one hundred thousand dollar certificate of deposit bearing a six-month maturity date (hereafter referred to as the "Certificate of Deposit") in the Atlantic-Pacific Bank and Trust Company, Ltd., of Nassau, the Bahamas, (hereafter referred to as "the Bank") (Complaint, App. 5a-16a). The basis of plaintiff's alleged loss is the fact that as of the time of trial it had not been successful in retiring the certificate and receiving a return of the monies it had invested.

This appeal is from a directed verdict in favor of defendants Cannon and Cannon Jerold granted at the close of plaintiff's evidence.

2. The Relationship of the Defendant Rittmaster to the Transaction at Issue

The evidence at trial abundantly established that the motivating force in causing plaintiff to purchase the Certificate of Deposit was the defendant Rittmaster (App. 76a-81a), a member of plaintiff's Board of Directors (App. 73a) and a financial consultant to plaintiff (App. 73a, 143a-144a) at the time the Certificate of Deposit was purchased. Mr. Rittmaster confessed liability prior to trial and did not take part in the trial itself (See Appellant's Brief p. 3). According to Murray Klein, president of plaintiff, Mr. Rittmaster first specifically suggested purchase of a Certificate of Deposit from the Bank (App. 76a-77a), provided the rationale for such a choice (App. 81a, 124a-125a), drafted the letter ordering the Certificate of Deposit (App. 76a), and took part in arranging for the deposit of the money in the Bank (App. 78a-79a). In authorizing the purchase of the Certificate of Deposit, Mr. Klein relied, among other things,

upon the advice of Mr. Rittmaster (App. 74a, 125a), which he had found to be sound on past occasions (App. 104a, 107a). When it came down to the actual delivery of money to the Bank, Mr. Klein himself dealt directly with the person whom he identified as the president of the Bank, a Mori Aaron Schweitzer, also a named defendant in the lawsuit (App. 79a, 135a).

Plaintiff had never met nor seen the defendant Cannon until the time of trial (App. 101a). His name had never been referred to in connection with the purchase of the Certificate of Deposit (Ibid).

3. The Relationship of Defendant Cannon to the Bank

The evidence at trial revealed that in September, 1972, Mr. Cannon had advanced one hundred thousand dollars (App. 163a) to help "the initial funding of the Bank" (App. 168a), so that the Bank could obtain its charter. In November, 1972, Mr. Cannon's one hundred thousand dollar advance was repaid by the Bank. All of this was several months prior to plaintiff's purchase of the Certificate of Deposit.

The evidence from Mr. Cannon's deposition which was

introduced at trial also established that after his investment, Mr. Cannon had "a very strong rooting interest" (App. 168a) in the Bank and was interested in "seeing the Bank be a success", based on the fact that in return for his initial investment, he had had the

"...option of sharing equally with Mr. Schweitzer and all participation in the bank as per our agreement." (Ibid.)

As Mr. Cannon explained, this option was the option of "...sharing equally [with Mr. Schweitzer] in the stock ownership with the bank" (Ibid.). The Agreement referred to by Mr. Cannon did not become a part of the evidence at the trial.

Mr. Cannon also visited the Bank in early March, 1973, reviewed its journals and working books, and took some notes (App. 164a-166a).

4. The Relationship of the defendant Cannon to defendant Rittmaster

The deposition testimony of defendant Cannon which plaintiff placed in evidence at the trial established that Mr. Cannon met on several occasions in December, 1972, and January and February, 1973, with Mr. Rittmaster and his business partner, Mr. Lawrence, to discuss business and investment information (App. 169a).

On February 8, 1973, at one of these meetings, they first discussed the Bank "...and what possibilities it might offer either or both of us" (App. 170a). Mr. Cannon had discussed the subject of the possible purchase by plaintiff of a Certificate of Deposit in the Bank with Mr. Rittmaster, a month or two prior to the purchase (App. 159a). Also, although he did not know the actual terms of the purchase, Mr. Cannon "...knew they were working towards having it purchased", and sometime later he found out that plaintiff had purchased the Certificate of Deposit (App. 160a).

The testimony also established that Mr. Cannon received two checks from the Bank for unsecured loans in the amounts of 25,000 dollars each to Messrs. Rittmaster and Lawrence in late April, 1973 (App. 158a), which, at Mr. Schweitzer's request, he forwarded to Rittmaster and Lawrence. Prior to receiving the checks ("some time early"), Mr. Cannon had learned in discussions with Messrs. Rittmaster, Lawrence and Schweitzer that the loans were being made (App. 158a-159a).

5. The Absence of Proof of Knowing Participation
by Cannon in the Transaction at Issue

The evidence at trial failed to establish that Mr. Cannon participated directly in the placement of the Certificate of Deposit with plaintiff. The evidence did not establish that the money loaned by the Bank to Messrs. Rittmaster and Lawrence was consideration for the placement of the Certificate with plaintiff. Moreover it failed to establish that Mr. Cannon had any knowledge of Mr. Rittmaster's position as a member of plaintiff's board. Indeed, the only evidence upon which plaintiff relies to impute such knowledge to Mr. Cannon is a prospectus of plaintiff, issued in conjunction with an issue in November, 1972, of stock in which the defendant Cannon, Jerold & Co. was a minor underwriter (App. 68a, Exhibit 1). Not only was no evidence introduced that Mr. Cannon had read the prospectus, the prospectus merely set forth that defendant Rittmaster's firm had the right to appoint an unnamed person to the board and that as of the date of the prospectus, it had "...no present intention of exercising its right to designate such nominee" (App. 141a-142a; Plaintiff's Exhibit 1, p. 22). In fact, Mr. Ritt-

master became a member of the plaintiff's board on January 25, 1973 (App. 142a).

6. The Basis of the Directed Verdict

Plaintiff's principal theory of the case against Mr. Cannon was that his involvement constituted "...out and out commercial bribery" (Opening Argument of plaintiff's counsel, Mr. Lee, App. 49a). Based on the factual record, it was plaintiff's theory that Mr. Cannon had the "...burden of proof to show that there was full disclosure to the board of directors. . . ." because he was "... knowingly dealing with a fiduciary" (Argument in opposition to motion for directed verdict, App. 194a).

The Court rejected plaintiff's theories and granted a directed verdict for defendant at the close of plaintiff's case upon the finding that:

"...the totality of proof adduced at trial up to this point falls far short of sustaining the elements which the law makes imperative as to each of the separate claims asserted herein" (App. 196a).

The Court elaborated that there was:

"...no evidence to either support or sustain the claim of scienter, fraud, misrepresentation, commercial bribery, or even the Ponzi game to which Mr. Lee

made reference. Even the proof...was in the main very thin indeed, and forces the fact finder to pile inference upon inference." (Ibid.)

A more detailed evaluation by the Court below of the plaintiff's failure of proof is set forth in the Court's Memorandum Opinion awarding costs and attorney's fees to defendants (App. 198a-200a). There it was noted that there was no proof by plaintiff that the Certificate of Deposit was part of a public offering, that it was unregistered, or that defendants were "persons who sold" (App. 198a). Similarly, in the opinion of the Court below, there was no proof of material misstatements or omissions, detrimental reliance, or scienter (App. 199a).

Finally, the Court explained its rejection of the commercial bribery theory since there was no evidence of an exclusive fiduciary relationship between Rittmaster and plaintiff, (Indeed, as the Court pointed out, the evidence showed that the financial consultant arrangement was "non-exclusive") or that Cannon had any knowledge of any such relationship (App. 199a).

7. Plaintiff's Repeated Mischaracterizations of the Record in its Statement of Facts

Even granting plaintiff the maximum adversarial

license to interpret the facts of record which fairness would allow, there is no way that its two page "Summary" in the "Statement of the Case" (Appellant's brief, pp 2-4), as well as many of the assertions in what plaintiff calls its "Chronology of Admitted and Undisputed Facts" can be credited as a proper rendition of facts. Indeed, many of the factual conclusions which it purports to draw would border on the scandalous even if they were included as part of the "Argument" portion of plaintiff's brief. A few examples should suffice.

First, there is no evidence that Mr. Cannon "bought" the Bank as alleged (although he advanced funds for its purchase). There is no evidence that Mr. Cannon "milked" the Bank. There is no evidence that the Bank was a "shell". Nor indeed, is there evidence of record that the Bank "failed". There is no evidence whatsoever that Mr. Cannon knew that Rittmaster was a member of the plaintiff's Board of Directors, and there is no direct evidence that he had actual knowledge that Rittmaster was a financial consultant to plaintiff. And finally there is no evidence upon which to characterize Mr. Cannon's conduct as: "...inducing known fiduciaries for personal gain to procure plain-

tiff to purchase a security in a shell bank", as the "Summary" concludes.

Similarly, there is no evidence of record that Mr. Cannon furnished "...all front money for the purchase" of the Bank (Appellant's Brief p.5), or that Mr. Cannon had "actual knowledge of the contents" of a prospectus of plaintiff which purported to give to defendant Rittmaster the right to designate a director (Id. at pp.6 and 10).

Rather than supporting plaintiff's appeal to this Court, it is submitted that the presence of these unsubstantiated allegations further supports the conclusion of the Court below in awarding attorney's fees to defendants that "...plaintiff's suit bordered on frivolity" and that plaintiff and others "...should be discouraged from hurling unfounded and specious allegations where irreparable damage to the reputations of others may ensue" (App. 199a-200a).

SUMMARY OF ARGUMENT

Plaintiff's testimonial proof at trial consisted only of the testimony of plaintiff's president, Murray Klein, and the introduction of a short portion of the deposition testimony of defendant Cannon. Klein had never met Cannon and had never heard of him prior to the time he participated in the purchase of the certificate of deposit in question. From this evidence, plaintiff sought to establish that Cannon was a control person of the Bank, that he intentionally sought to defraud plaintiff, and that he intentionally procured the disloyalty of defendant Rittmaster (one of plaintiff's directors and a financial adviser) and defendant Lawrence.

The Court below held that plaintiff's scant proof fell dismally short of establishing a prima facie case against Cannon and Cannon Jerold. It is submitted that seldom has there been a trial in which a defendant's directed verdict has more fittingly and properly been awarded. As an evaluation of the trial record will reveal, the Trial Court properly directed a verdict in favor of defendants Cannon and Cannon Jerold on the following claims of the Complaint and for the following

reasons:

1. With respect to the First and Second Claims of the Complaint (alleged violation of Sections 12(1) and 12(2) of the Securities Act of 1934), upon the grounds that:

- a) there was no evidence from which to conclude that a valid registration statement was not in effect with respect to the sale in question, and
- b) the evidence failed to establish a prima facie case that Cannon was a "person who sold" or "controlled" a person who sold the security in question;

2. With respect to the Second, Third and Fourth Claims of the Complaint (all involving alleged omissions and misrepresentations as to the solvency of the issuer) upon the ground that there was insufficient evidence as a matter of law to establish the true facts as to the Bank's solvency at the time of sale from which to conclude that misrepresentations or omissions occurred;

3. With respect to the Third and Fourth Claims of the Complaint (alleging 10b(5) violation and common law

fraud) on the ground that there was no evidence to establish a prima facie case of scienter on the part of defendant Cannon; and

4. With respect to the Seventh Claim of the Complaint (alleged intentional inducement of breach of fiduciary duty), the only other Claim pertaining to defendants Cannon and Cannon Jerold, upon the grounds that the evidence failed to establish a prima facie case as to the essential elements that:

- a) Cannon knew that a fiduciary relationship existed;
- b) Cannon was the cause of such a relationship being violated; and
- c) Cannon intended to cause a breach of fiduciary relationship.

Also, upon review of the record, it will be apparent that because of the paucity and tenuousness of proof on so many of the essential elements of plaintiff's case, the Trial Court did not abuse its discretion in awarding costs and attorney's fees to defendants.

ARGUMENTPOINT ITHE TRIAL COURT PROPERLY APPLIED
THE APPROPRIATE LEGAL STANDARDS
APPLICABLE TO DIRECTED VERDICTS

In directing the verdict for defendants, the Court applied the standards of Baker v. Texas & Pacific Railway Co., 359 U.S. 227 (1959) as set forth in Diapulse Corporation v. Birtcher Corp., 362 F.2d 736 (2d Cir. 1966):

"The directed verdict device was designed to be utilized in appropriate cases to spare the jury from lengthy deliberation when the evidence did not warrant it. When a party moves for a directed verdict, the trial judge must determine as a matter of law whether there is sufficient evidence to take the case to the jury. 'Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury'" (Id. at 743, quoted at App. 195a-196a).

The Supreme Court has similarly set forth the standards applicable to directed verdicts in Brady v. Southern Railroad, 320 U.S. 476 (1943):

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission

to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." 320 U.S. at 479-80.

See also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Fortunato v. Ford Motor Co., 464 F.2d 962 (2d Cir. 1972); Brown v. U.S. Fidelity & Guarantee Co., 314 F.2d 675 (2d Cir. 1963); O'Connor v. Pennsylvania Railroad, 308 F.2d 911 (2d Cir. 1962).

This Court's function on appeal is to determine whether, based upon an evaluation of the evidence in the record, there were any questions of fact for the jury to decide. Stief v. J.A. Sexauer Manufacturing Co., 380 F.2d 453 (2d Cir. 1967), cert. denied, 389 U.S. 897 (1967). As the following discussion reveals, the Court properly applied the above legal standards to the fact situation in this case.

POINT II

THE TRIAL EVIDENCE FAILED TO ESTABLISH A PRIMA FACIE CASE ON ANY OF THE SECURITIES LAW CAUSES OF ACTION SET FORTH IN THE COMPLAINT

A.

The evidence failed to prove that the Certificate of Deposit was an unregistered security.

Plaintiff's first claim against Cannon and others was based upon Section 12(1) of the Securities Act of 1933 (App. 7a-11a). Pursuant to that section, damages can be recovered for the issuance or sale of an unregistered security. Plaintiff's second claim, based upon Section 12(2) of the Securities Act also is premised upon the sale of an allegedly unregistered security (App. 12a). (See also Appellant's Brief p. 16). Although plaintiff alleged the threshold issue of non-registration in its complaint (Para. 15 & 24, App. 9a and 11a), which was placed in issue by defendants in their Answer (Para. 8 & 10, App. 18a, 19a), plaintiff's proof on this issue was conspicuously absent. Plaintiff on this appeal vigorously asserts that an SEC Release now establishes that issue (Appellant's Brief, p. 12). Without addressing

the matter of that Release's validity as evidence (see United States v. Sussman, 37 F.Supp. 294 (E.D.Pa. 1941)), it is sufficient to point out that it never was offered or received at trial. The jury had before it no evidence from which to conclude that the Certificate of Deposit had not been registered. In short, plaintiff made no prima facie showing on the essential element that no registration statement was in effect at the time of the alleged sale. S.E.C. v. Continental Tobacco Co. of South Carolina, 463 F.2d 137, 155 (5th Cir. 1972); Hill York Corp. v. American International Franchises, Inc., 448 F.2d 680, 686, (5th Cir. 1971); Lennerth v. Mendenhall, 234 F. Supp 59, 63 (N.D. Ohio 1964); 111 Loss, Securities Regulation 1693 (2d Ed. 1961). See also United States v. Sussman, supra.

Accordingly, the verdict was properly directed in defendants' favor on the First and Second Claims for failure of proof on the essential issue of non-registration.

B.

The evidence failed to establish facts from which it could reasonably be concluded that Cannon was a "person who sold" under the securities laws.

In order for plaintiff to recover against Cannon under Section 12(1) of the Securities Act of 1933 (15 U.S.C. §771(1)) (First Claim of the Complaint, App. 7a-11a) or Section 12(2) (15 U.S.C. §771(2)) (Second Claim of the Complaint, App. 12a), it was necessary for plaintiff to prove that Cannon was a "person who sold" within the meaning of the securities laws. See Barlas v. Bear, Stearns & Co., 65-66 CCH Fed. Sec. L.Rep. par. 91, 674 (N.D. Ill. 1966); Winter v. D.J. & M. Investment and Contracting Corp., 57-61 CCH Fed. Sec.L. Rep. par. 90, 990 (D.C. Cal. 1960); Wonneman v. Stratford Securities Co., Inc., 57-61 CCH Fed. Sec. L.Rep. par. 90, 923 (S.D. N.Y. 1959).

Plaintiff confronts this issue by contending that Cannon "controlled" a "person who sold" and is therefore liable as a control person under Section 15 of the Securities Act of 1933 (15 U.S.C. §770). The element of control is nowhere alleged in the Complaint. Although plaintiff has been consistent in alleging the issue of

control at various stages of the proceedings after the filing of the complaint, it has been inconsistent in its claims of whom it is Cannon is alleged to have controlled. In its trial memorandum filed on the eve of trial, plaintiff contended that Cannon controlled defendants Rittmaster and Lawrence (Plaintiff's Trial Memorandum, p. 12). In its brief before this Court, plaintiff now apparently abandons that theory and alleges that Cannon controls the bank (i.e., the issuer) (Appellant's Brief, p. 16).

The fact is that the evidence does not support plaintiff's theory of control. In order to establish control of an issuer, it is necessary to show that power existed to manage and direct the issuer's corporate policy, including the power to obtain required signatures on a registration statement. S.E.C. v. Micro-Moisture Controls, Inc., 148 F. Supp. 558 (S.D.N.Y. 1957), rearg. denied 21 F.R.D. 164 (1957); Nicewarner v. Bleavins, 244 F. Supp. 261 (D.C. Colo. 1965). Similarly, in Perma-Grass, Inc., 70-71 CCH Fed. Sec. L. Rep. par. 78, 108 (S.E.C. 1971) it was held that organizers who were not presently officers or directors of the issuer were not controlling

persons.

Under these authorities it is clear that the facts of record, establishing only that Cannon had once loaned money to the Bank, had been repaid, had the mere option of sharing in stock ownership with the president, had once visited the Bank, and had conferred with the president on occasion, are insufficient to present a prima facie case on the issue of control. Accordingly, the verdict in favor of Cannon was properly directed by the Court below on both the First and Second Claims of the Complaint.

C.

The evidence failed to establish a prima facie case of misrepresentation to support plaintiff's Second, Third and Fourth Claims.

The Second Claim of the Complaint was based on Section 12(2) of the Securities Act of 1933 which establishes liability for the sale of securities by use of misleading statements or omissions (App. 12a). The Third Claim was based on Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)) which prohibits the use of devices, schemes or artifices to defraud in connection with the sale of securities (App. 12a-13a).

And the Fourth Claim was based upon a theory of common law fraud (App. 13a-14a).

In the Complaint, all three claims were founded upon the same alleged misrepresentations or omissions, namely, the failure by Cannon and others to:

"... state a material fact necessary to make the statements, in light of the circumstances under which they were made, not misleading, i.e., that the Bahamas Bank was virtually insolvent. . . ."

(Complaint, Par. 27, App. 12a; Par. 30, Id. at 12a-13a; Par. 33, Id. at 13a).

(In its Appeal Brief, plaintiff now adds a claim that the alleged wrongful omissions included failure to advise plaintiff that the Certificate had not been registered as a security. However, because this new allegation was not pleaded, and because it suffers from a failure of proof on the threshold issue of non-registration as discussed above (supra at Argument IIA), it is not treated separately here).

In order for plaintiff to prevail at trial on any of the three misrepresentation claims, it was necessary to set forth evidence from which the trier of fact could

conclude that the Bank was in fact "virtually insolvent" at the time the Certificate of Deposit was purchased. Only then could plaintiff have gone the further step of establishing the alleged omission and its significance as a misrepresentation.

The only direct evidence in the record even remotely bearing upon the Bank's condition at any time was a short financial balance sheet for the Bank reflecting the Bank's financial condition on November 30, 1972, when it commenced operations after purchasing the charter and assets of a Canadian bank (Plaintiff's Exhibit 3, App. 82a, 144a-146a). Not only does this sheet not reveal a condition of virtual insolvency on its face, it does not purport to reflect the condition of the bank in April, 1973, at the time the Certificate of Deposit was purchased.

Other financial evidence included the handwritten notes which Cannon took on his trip to the Bank in early March. Again, the contents of the notes fail to establish on their face a condition of virtual insolvency. Moreover, nowhere in the record are the notes represented to be a true and complete summary of the condition of working books of the Bank at the time of Mr. Cannon's

trip. They merely constitute all of the notes that he made at the time (App. 166a), hardly the quality of proof which should minimally be required in proof of serious fraud allegations.

Finally, there was no evidence in the record, aside from the circumstantial fact that the Certificate of Deposit was not retired at maturity, to establish the financial condition of the Bank at the time of trial. It was never established that the Bank was insolvent, bankrupt, or liquidated at that time. For all that the record revealed, the Certificate may not have been retired because of an independent dispute between the (solvent) Bank and plaintiff or that the otherwise solvent Bank had been prevented from honoring its obligations by the intercession of the newly independent Bahamian government. Certainly in a case of this magnitude involving the serious charges of misconduct that it did, the Court below quite properly directed the verdict in favor of defendants on the Second, Third, and Fourth Claims of the Complaint.

D.

The evidence failed to establish a prima facie case of scienter to support Plaintiff's Third and Fourth Claims.

Liability under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)) and liability for common law fraud require proof of conscious, wrongful intent to defraud. See S.E.C. v. Texas Gulf Sulphur, 401 F.2d 833 (2d Cir. 1968); Globus v. Law Research Service, Inc., 418 F. 2d 1276 (2d Cir. 1969); Schemtob v. Shearson, Hamilli & Co., 448 F.2d 442 (2d Cir. 1971).

No trial evidence establishes any such wrongful conduct or intent on the part of the defendant Cannon. Certainly, the conclusion that such fraudulent intent existed from the fact that Cannon advanced a loan to the Bank, was repaid, discussed the Bank with fellow investment businessmen Rittmaster and Lawrence and knew that Rittmaster was dealing with the Bank on behalf of plaintiff and that Rittmaster and Lawrence were also borrowing money from the Bank on their own, would require the very piling of unjustifiable inference upon inference which justice prevents. Accordingly, the verdict was properly directed in Cannon's favor on this issue.

E.

Instead of supporting the elements of plaintiff's claims, much of the evidence supports Cannon's affirmative defenses.

Rather than supporting plaintiff's case, defendants contend that much of the evidence adduced during the plaintiff's case in chief went far toward establishing several of Cannon's affirmative defenses.

1. Independent Source of Information

The Eighth Affirmative Defense (App. 25a) against plaintiff's Second Claim (alleged violation of Section 12(2)) alleged that at all material times plaintiff was in a position to obtain all information necessary to provide it with sufficient knowledge as to the condition of the Bank.

As Section 12(2) specifically sets forth, a condition of recovery by a purchaser of securities is that the purchaser not have known of the facts underlying the untruth or omission upon which he bases his claim of liability. That proposition has been clearly set forth in the case of The Value Line Fund, Inc. v. Marcus, 64-66 CCH Fed. Sec. L. Rep. par. 91, 523 (S.D.N.Y. 1965)

where it was held that statements of a seller concerning the contemplated improvement of working capital figures and the establishment of a bank line of credit were not actionable misrepresentation since the true facts necessary to provide sufficient information regarding such matters were readily accessible to the purchaser.

In the instant case, the evidence established that not only plaintiff's director and financial consultant, defendant Rittmaster, but also plaintiff's president himself was dealing directly with the president of the Bank in connection with the purchase of the Certificate of Deposit (App. 79a, 135a). The denomination of the Certificate (\$100,000) was sufficiently large to give plaintiff power to obtain what financial material it needed to inform it of the Bank's condition. The evidence also revealed that plaintiff, through its president, was relying upon the independent investigation and advice of its attorneys who were not in any way implicated with the defendants (App. 77a, 123a, 127a).

All of this not only supports defendant's contention that plaintiff knew, or in the exercise of reasonable care should have known, of the true condition of the Bank

at the time the Certificate of Deposit was purchased, but it also significantly undercuts plaintiff's attempt to prove reliance upon any misrepresentation or omission which it imputes to the defendants.

2. Private Placement

Had plaintiff presented prima facie evidence that the Certificate of Deposit was an unregistered security, defendants would have proceeded with their affirmative defense that the sale of the Certificate of Deposit in this case was a transaction "... not involving any public offering" and thus exempt from registration under Section 4(2) of the Securities Act of 1933 (15 U.S.C. §77d(2)). (See Second Affirmative Defense, App. 21a-22a).

Once again the evidence of plaintiff's case at trial contributed much to establishing the nature of the transaction as a private placement. Resolution of this issue involves a determination of "...the need of the offerees for the protection afforded by registration."

SEC v. Ralston Purina Company, 346 U.S. 119, 127 (1953):

"An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.'" Id. at 125.

Certainly the denomination of the offering here involved (\$100,000), the access of the plaintiff to the Bank's officers, plaintiff's economic bargaining power by virtue of the size of the transaction (see SEC Regulation 146, summarizing legal principles applicable to private placement determinations, including access to financial information), and the manner of the offering (direct dealing between plaintiff's president and one of its directors, a sophisticated investment broker, and the Bank's president), all contribute to the conclusion that the sale of the Certificate of Deposit was an exempt private placement. See The Value Line Fund, Inc. v. Marcus, 64-66 CCH Fed. Sec. L. Rep. par. 91, 523 (S.D. N.Y. 1965), which held that the offering of shares by a corporate officer through a broker to mutual funds was not a public offering since there was sufficient access to information and investment sophistication to protect the purchaser.

The fact that the plaintiff's evidence significantly bolstered defendant's affirmative defenses provides even more reason supporting the propriety of the direction by the Court below of a verdict in favor of defendants.

POINT IIITHE TRIAL EVIDENCE FAILED TO ESTABLISH A PRIMA FACIE CASE TO SUPPORT PLAINTIFF'S CLAIM OF COMMERCIAL BRIBERY

In plaintiff's view, the principal thrust of its case was its pendent Seventh Claim, the one which plaintiff's counsel referred to as "out and out commercial bribery" (Plaintiff's opening, App. 49a; Plaintiff's opposition to motion for directed verdict, App. 194a), that Cannon "...procured and induced the disloyalty and violation of fiduciary obligation and breach of contract" by defendants Rittmaster and Lawrence (Complaint, Par. 42, App. 15a). This Claim is founded upon Section 312 of the Restatement of Agency, 2d, which provides:

"A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal."

(Appellant's Brief, p. 13).

Once again, an analysis of the record reveals a failure of prima facie proof as to each element of this claim, which supports the direction of a verdict in favor of defendant Cannon.

A. The Fiduciary Relation and its Breach

Assumedly, the relationship allegedly breached was that of director of and financial advisor to plaintiff by defendant Rittmaster (App. 73a). What was not clearly established by the record was the nature of the breach. It could have been negligent failure to obtain sufficient financial information concerning the Bank. Although plaintiff wishes to go farther to establish Rittmaster's intentional violation of duty in order to obtain a personal financial advantage, the nexus between the loans to Rittmaster and Lawrence and the placement of the Certificate of Deposit with plaintiff was not established. Also not established was what duty, if any, Rittmaster and Lawrence owed as financial advisors to plaintiff in accounting to or disclosing to plaintiff their personal transactions with the Bank (See, e.g., App. 143a and 128a-129a).

B. The Lack of Evidence as to Cannon's Role in Procuring Rittmaster's or Lawrence's breach.

Assuming intentional breaches and nondisclosures by Rittmaster and Lawrence, the evidence was insufficient to link Cannon to the breaches as a causative factor.

Cannon's role consisted in discussing the Bank with fellow investment brokers Rittmaster and Lawrence (App. 170a) and in discussing and knowing that Rittmaster and Lawrence were dealing directly with the Bank towards the placement of a Certificate of Deposit with plaintiff (App. 159a). Finally, the evidence reveals that Cannon also knew that Rittmaster and Lawrence were interested personally in borrowing money from the Bank (App. 158a-159a). So far as the evidence reveals, Cannon's role prior to the placement of the Certificate of Deposit stopped here: hardly the kind of proof to permit a jury to conclude that Cannon "procured" or "caused" Rittmaster to violate his duties.

The fact that Cannon later was the conduit for delivery of loan checks to Rittmaster and Lawrence does not amount to proof of causation, without piling inference upon inference. Nothing in the evidence tended to show that the loans were granted as a quid pro quo for the placement of the Certificate (see App. 158a-159a). Moreover, it should here be emphasized that there is nothing inherently wrong in personal loans being made by a Bank to investment brokers who have had a role in

placing funds with a Bank on behalf of their principals. Certainly, if such facts were disclosed by Rittmaster and/or Lawrence to plaintiff, they would have been proper in this case, even if they had been offered as a result of the placement of the Certificate. (See, e.g., App. 128a-129a, where plaintiff's president acknowledged that director Rittmaster had had personal dealings with another bank that he was recommending to plaintiff).

C. Cannon's knowledge of the Fiduciary Relationships

Without knowledge of the fiduciary relationships at the time of the transaction in question, it could not be established that Cannon "intentionally caused their breach." Plaintiff has repeatedly alleged that Cannon had "actual knowledge of the fiduciary relationship." However, analysis of the record reveals that plaintiff has nothing more than the strength of its bare allegations to establish this pivotal fact.

The evidence reveals that Cannon's brokerage, Cannon, Jerold & Co., was a sub-underwriter in a public offering of plaintiff's stock in late 1972. The prospectus for that offering set forth the commitment of plaintiff

"to use its best efforts for a period of five (5) years to elect a nominee of (Rittmaster, Lawrence) to (its) Board of Directors".

However, the prospectus also reported that Rittmaster, Lawrence

"advised (Aid Auto) it (has) no present intention of exercising its right to designate such nominee, but if such nominee is designated, it is the present intention ... to designate its Chairman of the Board, Arthur Rittmaster, Jr." Prospectus, Aid Auto Stores, Inc., dated November 30, 1972, p. 22, Plaintiff's Exhibit 1.

Pursuant to that power, Rittmaster became a director on January 25, 1973 (App. 127a).

The prospectus also reported that Rittmaster, Lawrence was to serve as financial advisor to Aid Auto Stores, Inc., on a non-exclusive basis:

"The Company (Aid Auto) has agreed to retain the Representative (Rittmaster, Lawrence, and Co.) as financial consultants for a period of two (2) years...." (Id. at p. 21)

and that the exercise of duties as financial consultants would generate commissions for Rittmaster, Lawrence (designated as "the Representative"):

"The Representative and the Company have agreed that for a period of five

(5) years, the Representative will, on a non-exclusive basis, receive on all acquisitions, mergers or similar public combinations consummated by the Company which were introduced or initiated by the Representative, a commission." Id.

Nothing of record reveals that Cannon ever read the prospectus or had knowledge that Rittmaster was a director or a financial advisor to plaintiff. Even if knowledge of the contents of the prospectus were to be imputed, nothing in it would place Cannon on notice of a relationship which would restrict the independent status of Rittmaster and Lawrence as investment brokers. No designee director was named or contemplated, and even the financial advisor arrangement was stated to be "non-exclusive" and permitted Rittmaster and Lawrence to obtain additional fees for their services in individual matters.

It is therefore clear that the Court properly took the case from the jury on the commercial bribery issue, since the jury would have had to speculate on the issue of the requisite knowledge of defendant Cannon.

D.The Absence of Evidence Bearing upon
Cannon's Intent

There was no evidence to establish the element of Cannon's intent (assuming adequate knowledge) to procure the disloyalty of Rittmaster and Lawrence. The only evidence established that Cannon had had business contacts with Rittmaster and Lawrence and that he knew they were in contact with the Bank about a possible deposit by plaintiff. The fact that Cannon delivered loan checks to Rittmaster and Lawrence several weeks later is not linked on the record to the transaction and cannot support the element of intent.

E.Plaintiff's Misconception of the Law

In plaintiff's brief on appeal to this Court, Plaintiff's counsel rashly and unjustifiably characterizes the Memorandum of the Court below granting attorney's fees to defendants as containing "extraordinary confusion" which "lacks counterpart in the body of law" in its consideration of the question of defendant Rittmaster's proven relationship to plaintiff (Appellant's Brief p. 13).

The brief even goes so far as to inexplicably associate the Court's position with what counsel refers to in a footnote as "slapdash fraud". (Ibid.)

Without commenting further upon such unfounded characterizations, it is submitted that the only "extraordinary confusion" on this subject lies with plaintiff's counsel in his expectation that upon the shoddy proof of what he repeatedly referred to as "commercial bribery" by Cannon, that instead of the plaintiff having the burden of proving intent to corrupt, the burden of proof somehow magically shifted to Cannon "... to show that there was full disclosure to the board of directors." (App. 194a-195a; Affidavit of Clendon H. Lee in opposition to motion for costs, par. 6, App. 40a). See also plaintiff's single proposed jury instruction, appended in its entirety to this Brief, (infra, pp 54-55).

It is because of that "extraordinary confusion" that defendant Cannon has been forced to defend himself against frivolous claims and to respond to this frivolous appeal.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN AWARDING COSTS AND
ATTORNEY'S FEES TO DEFENDANTS.

Plaintiff, in its statement of issues on this appeal, challenges the propriety of the order of the Court below awarding costs and attorney's fees to defendants Cannon and Cannon Jerold. However, it does not further brief this issue. The award of attorney's fees in this action was founded upon Section 11(e) of the Securities Act of 1933, which allows such an award if the Court in its discretion finds that the securities law claims were without merit. Klein v. Shields & Co., 72-73 CCH Fed. Sec. L. Rep. par. 93, 692 (2d Cir. 1972); Stratton Group, Ltd. v. Chelsea National Bank, 71-72 CCH Fed. Sec. L. Rep. par. 93, 375 (S.D.N.Y. 1972). Such determinations are discretionary with the Court and can be set aside only upon a finding of abuse of discretion. Stadia Oil & Uranium Company v. Wheelis, 251 F.2d 269 (10th Cir. 1957).

The Court below set forth ample reasons supporting its award (Memorandum Opinion, App. 198a-200a). Furthermore the record below and the briefs on this appeal further

demonstrate the overwhelming weaknesses of plaintiff's case.

Accordingly, this Court should not set aside the Court's award of admittedly reasonable attorney's fees.

POINT V

THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' JURY DEMAND

Still again plaintiff has set forth an issue without briefing it, this time with respect to the Court's denial of plaintiff's motion to strike the defendants' jury demand. Clearly the trial Court properly ruled that the complaint, which sought damages only on all claims, was an action at law entitling defendants to a trial by jury. Hohmann v. Packard Instrument Co., 471 F.2d 315 (7th Cir. 1973), Dasho v. Susquehanna Corp., 461 F.2d 11 (7th Cir. 1972), cert. denied, 408 U.S. 925 (1972). The mere fact that the Seventh Claim of the Complaint alleged procurement of the breach of a fiduciary relation does not convert that tort claim into an equitable proceeding. See e.g., Donemar, Inc. v. Malloy, et al., 252 N.Y. 360 (1930). The Trial Court properly held, therefore, that:

"...where the action is against a third party [to the alleged fiduciary] ... where the relief sought is money damages and where the plaintiff has proven no fiduciary obligation on defendants' part, the case should be tried to a jury."
(App. 70a)

See also Kaminsky v. Kahn, 20 N.Y. 2d 573 (1967); Restatement of Agency 2d, §312, comment D.

Finally, it should also be pointed out that this issue is moot unless the Court reverses the direction of a verdict in favor of defendants, since the Court below, who would be the trier of fact if the jury demand were stricken, has ruled that as a matter of law, plaintiff failed to establish a prima facie case. From this it is clear that plaintiff would have fared no better on its fact issues if there had been no jury.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the directed verdict in favor of defendants' Cannon and Cannon Jerold, should be affirmed in all respects.

Respectfully submitted,

THAL & YOUTT
Attorneys for Defendants-
Appellees

OF COUNSEL:

Harry E. Youtt

STATUTORY ADDENDUM

I. Relevant Provisions of Securities Act of 1933

(15 U.S.C. §77a et seq.)

Section 2. DEFINITIONS

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. [As amended by Act of June 6, 1934, 48 Stat. 905.]

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt

or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to buy" as used in subsection (c) of section 5 shall not include preliminary negotiations or agreements between an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security. [As amended by Act of August 10, 1954, effective October 9, 1954, 68 Stat. 683.]

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates or

with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering. [As amended by Act of June 6, 1934, 48 Stat. 905.]

* * *

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference. [As amended by Act of August 10, 1954, effective October 9, 1954, 68 Stat. 683.]

Section 4. EXEMPTED TRANSACTIONS

The provisions of section 5 shall not apply to --

[As amended by Act of August 20, 1964, Sec. 12, 78 Stat. 580.]

(1) transactions by any person other than an issuer, underwriter, or dealer. [As amended by Act of June 6, 1934, 48 Stat. 906; Act of August 10, 1954, effective October 9, 1954, 68 Stat. 683; Act of August 20, 1964, Sec. 12, 78 Stat. 580.]

(2) transactions by an issuer not involving any public offering. [As amended by Act of June 6, 1934, 48 Stat. 906; Act of August 10, 1954, effective October 9, 1954, 68 Stat. 683; Act of August 20, 1964, Sec. 12, 78 Stat. 580.]

Section 5. PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly --

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or [As amended by Act of August 10, 1954, effective October 9, 1954, Sec. 7, 68 Stat. 684.]

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Section 11. CIVIL LIABILITIES ON ACCOUNT OF FALSE
REGISTRATION STATEMENT

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment. If such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly in which all

other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

Section 12. CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS

Any person who --

(1) offers or sells a security in violation of section 5, or [As amended by Act of August 10, 1954, effective October 9, 1954, Sec. 8, 68 Stat. 685.]

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of

transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security. [As amended by Act of August 10, 1954, effective October 9, 1954, Sec. 8, 68 Stat. 685.]

* * *

Section 15. LIABILITY OF CONTROLLING PERSONS

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11, or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence

of the facts by reason of which the liability of the controlled person is alleged to exist. [As amended by Act of June 8, 1934, 48 Stat. 908.]

II. Relevant Provisions of Securities Exchange

Act of 1934 (15 U.S.C. §78a et seq.)

Section 10. REGULATION OF THE USE OF MANIPULATIVE AND DECEPTIVE DEVICES

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Reg. §240.10b-5 (Rule 10b-5) EMPLOYMENT OF MANIPULATIVE AND DECEPTIVE DEVICES

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements

made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[Adopted in Release No. 34-3230, May 21, 1942, 13 F.R. 8177.]

APPENDIX

PLAINTIFF'S PROPOSED JURY CHARGE

You must find in favor of plaintiff in the amount of \$100,000 face amount of the certificate of deposit, and \$44,000 being the amount of the advance payment of the consultation fee, \$2,000 being the finders fee paid to Iwanier as an employee of RL,

Unless the defendants have proven that they laid bare the truth, without ambiguity or reservation, in all its stark significance by communicating and informing the Board of Directors of Aid Auto Stores prior to April 13, 1973:

- (a) That Cannon had promised Rittmaster and Lawrence personal loans from the Bahamas bank if they were successful in obtaining deposits;
- (b) That Cannon had promised Iwanier as an employee of RLC a commission for obtaining deposits;
- (c) That Cannon had negotiated and agreed with Rittmaster and Lawrence prior to the purchase of the certificate of deposit for the personal loans;

- (d) That the personal loans were to be executed simultaneously with the purchase of the certificate of deposit;
- (e) That Bahamas bank would contend that payment of the certificate of deposit was dependent and contingent upon repayment of the personal loans by Rittmaster and Lawrence.

Even if you find that the Board of Directors was fully informed as to all of the foregoing, you must still find for the plaintiff unless the defendants have proven that the Board of Directors was fully informed and approved the actual making of the loans of \$25,000 each to Rittmaster and Lawrence and the delivery of checks by Cannon personally to them on April 23, 1973 and the \$2,000 fee paid to Iwanier and the Board of Directors ratified and confirmed these loans.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

AID AUTO STORES, INC.,

Plaintiff-Appellant,

against

HERBERT S. CANNON et al.,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 10th day of April 1975 ~~XXXX~~ at 90 Park Ave, N.Y. N.Y.

deponent served the annexed Appellees Brief

upon

ROGERS, HOGE & HILLS

the Attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 10th
day of April 1975

~~XXXXXX~~

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
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COMMISSION EXPIRES MARCH 30, 1977

Murray Klein—for Plaintiffs—Direct

I called Mr. Rittmaster and told him of this [52] and he said, "Okay. There is nothing much we can do about it."

I then called Mr. Schweitzer at the bank and also told him to put it through normal channels, which he did.

Q. Was the check handed to Mr. Schweitzer or handed to Mr. Rittmaster's messenger for delivery to Mr. Schweitzer, was that check cashed? A. Yes, that check was cashed.

Q. And the bank account of Aid Auto was debited in that amount, is that correct? A. That is correct.

Q. Did you receive anything from Atlantic & Pacific Bank? A. Yes. We received a receipt for our deposit with the terms stipulated.

Q. I show you a receipt and I ask you if that is what you received from the Nassau Bank. A. Yes.

Q. Is this what you referred to as a certificate of deposit? A. A receipt for a certificate of deposit, I believe.

Q. It states "Deposit receipt fixed non-transferable," and this is what you mean by a C.D.? [53] A. Yes, sir.

Mr. Lee: I offer it in evidence as Plaintiff's Exhibit 2.

The Court: Any objection?

Mr. Youtt: I have no objection.

The Court: Received.

(Plaintiff's Exhibit 2 was received in evidence.)

Q. After your receipt of Plaintiff's Exhibit 2, the certificate of deposit, when was the next time it was the subject of any discussion? A. At the board meeting of April. I believe it was April 23 or 24 of 1973.

Q. What was the nature of that discussion? A. The board was asked to approve the actual deposit and in some

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of the discussion—Mr. Rittmaster was present at the meeting. He was asked why this bank, why did we move out of the country? He said that he felt that there was a lot of foreign interest in United States stocks, but that many people, many foreign investors would prefer to conduct their financial transactions through a bank not in the United States.

Q. Did he state what relationship that had to do with the purchase of a certificate of deposit in the [54] A & P Bank? A. No. Other than—

The Court: I am sorry, but I must insist. Did he say that, yes or no, and if the answer is no, that is all you can say.

The Witness: May I have the question again?

The Court: Certainly.

Read it to him, Mr. Court Reporter.

(Question read.)

A. No.

The Court: Next question.

Q. Was there any other discussion at the board meeting with respect to this certificate of deposit? A. Yes. Mr. Rittmaster was asked whether he had secured the financial statement from the bank. He said that he had not, but it was forthcoming.

Q. When was this certificate of deposit next a subject of discussion? A. At our annual meeting on I believe May 25 of 1973. Mr. Rittmaster approached me prior to the beginning of the meeting and gave me a yellow envelope and he said, "This is what you have been waiting for."

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Q. What was in that envelope? A. I didn't open it during the meeting. I went [55] back to my office with our executive vice-president, Mr. Neufeld, and got to some company business. We were joined there by Mr. Milton Wallace, a director, and our attorney in Florida. I then opened up my attache case and removed the manila envelope given to me by Mr. Rittmaster. It contained a pension plan proposal, which I had submitted to the directors for their study, and it contained a stub-type of financial statement from the Atlantic & Pacific Bank.

Q. I ask you whether the paper I am handing you is a copy of what Mr. Rittmaster had put in the envelope? A. Yes, it is, sir.

Mr. Lee: I offer it in evidence as Plaintiff's Exhibit 3.

The Court: Any objection?

Mr. Youtt: No objection.

(Plaintiff's Exhibit 3 was received in evidence.)

Q. Was this Plaintiff's Exhibit 3 which you referred to as a stub financial statement the subject of any discussion?

A. Yes, it was.

Q. Was there any discussion? A. Yes. There was.

[56] Q. And with whom? A. Mr. Neufeld, Mr. Wallace and myself evaluated it and we felt it was a fairly weak position for a bank. Mr. Wallace called Mr. Biegen and gave him the figures which were on the statement and a determination was made at that time that we seek early retirement of our certificate of deposit.

Q. Was the first paragraph of the text appearing at the bottom of that the subject of any discussion?

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The Court: No. Have the record reveal what you are talking about. What exhibit?

Mr. Lee: Exhibit 3.

The Court: Was that the subject of what, Mr. Lee?

Mr. Lee: Any discussion.

A. The first paragraph?

Q. Yes. A. No, sir.

Q. Following the discussion of seeking early retirement of the certificate of deposit, what steps were taken? A. I called Mr. Rittmaster the following morning and advised him of—

Q. The following morning being what? A. That should have been May 26, I believe. I am a little hazy on dates. It was the day after the [57] annual meeting, which I believe was May 25. So this should have been the morning of the 26th. I called Mr. Rittmaster and told him of our desire to retire our certificate of deposit with early maturity.

He felt that it shouldn't be done, but we said this is what we want. We do not like the statement of the bank.

He said, "Well, in any event, they are going to come out with a stronger statement which I will send to you as soon as I receive it, but I will request that your C.D. be retired."

Q. When was your next discussion on that subject? A. Later in the month, and I can't pin it now, I again spoke with Mr. Rittmaster.

Q. This is still the month of May? A. This is the month of May, I believe, and he said that he had spoken to the people at the bank and although they were reluctant to retire the note he was applying muscle and he felt that we should receive something from them within the next few weeks.

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Q. Following that conversation with Mr. Rittmaster what transpired next? A. As I recall nothing came through from the bank. I called Mr. Rittmaster's office and I think this again [58] was late in May or it might have been early June and Mr. Lawrence informed me that Mr. Rittmaster was in the hospital for some surgery. I spoke to Mr. Lawrence, expressed my indignation at the position I was put in, having to do all of this back and forth, the conversation, and he said, "You are right, but I really won't know anything until Arthur is back."

Q. Arthur being Arthur Rittmaster? A. Arthur Rittmaster, I am sorry.

Mr. Rittmaster left the hospital, I called his home and he never called me back.

Q. When was it that you called his home, approximately? How long afterwards? A. That again had to be late May or early June.

Q. When was your next discussion with Mr. Rittmaster on the subject? A. I really can't recall.

Q. I can't hear you. A. I said I cannot recall. So many things started to happen and I was running a business, so I haven't got all these things down.

Q. Is there anything that you could refer to which would refresh your recollection? A. My notes possibly could tell me.

[59] Mr. Lee: May I suggest, your Honor, that the witness examine—

The Court: The only trouble with that is that that is something that should have been a subject of discussion between you and your client long before trial.

Mr. Lee: It has.

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The Court: We ought to have things popping, like that. We don't want to wait for you to find this paper or that paper, but you have gone as far as you have. Give him the sheath of stuff that you think might be pertinent. Take your time, Mr. Klein, and see if any of these papers refresh your recollection as to the next date of your talking with Mr. Rittmaster.

A. I have nothing recorded until August 7, although I assume—

The Court: You see, that is the trouble. Look at what is going to happen, Mr. Klein. I know you don't mean to do it and I am sure that you are doing the best you can, but it is exactly that sort of thing that makes a Judge rather jumpy because you are likely to say something and I would have to dismiss this jury and start all over again. That is the reason why the law says, "Don't let them get out of hand," and you are getting out of hand every time you leave the subject. We are not supposed to know [60] what is going through your head when you are looking through those papers. You have only one thing to tell us. "After looking at them they do not refresh my recollection as to the next date," or "they do help me refresh my recollection or trigger my memory," but your answer is they don't refresh your recollection as to the date?

The Witness: They do. There is an indication of of a conversation on the 7th.

The Court: Then the answer is yes, it does refresh your recollection, right?

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The Witness: Yes, your Honor.

The Court: On what date?

The Witness: August 7th.

The Court: So you are now saying that your recollection, having been refreshed on August 7th you had a further talk with Mr. Rittmaster?

The Witness: Yes, sir.

The Court: Okay, now go ahead.

Q. Are the papers that you examined that refreshed your recollection the same papers that you had in front of you when Mr. Youtt examined you before trial in our office?

A. Yes, sir.

Mr. Lee: Copies of those papers have heretofore been furnished to Mr. Youtt.

【61】 The Court: What difference does it make, Mr. Lee? You can show him anything from a 250 pound cemetery slab to a microscopic item. Anything that will refresh his recollection. He says his recollection has been refreshed.

Now let's have the conversation then.

Q. What happened on August 7, 1973, Mr. Klein? A. Mr. Rittmaster called me and advised that I could contact Mr. Colin Davies at the Bahama Bank and he would probably have some information for me as to our certificate of deposit.

Q. Did you telephone Mr. Davies? A. Yes, I did.

Q. In the Bahamas? A. In the Bahamas.

Q. So that you telephone from New York to the Bahamas? A. That is correct.

Q. Did you speak to Mr. Davies? A. Yes, I spoke with Mr. Davies.

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Q. What was the subject of your conversation? A. The subject revolved about the early retirement of our certificate of deposit.

Q. What did you say to him and what did he say to you? [62] A. I introduced myself, never having met the man, and although I know that he—

The Court: You see, there goes the mental operation, "although he." Now, that is out. Go ahead. What was said.

Q. What did you say to him and what did he say to you?

The Court: Isn't this Judge terrible? But that is the way it is. That is the law.

A. Well, Mr. Davies had signed the certificate of deposit.

The Court: That is his job, your lawyer's job. He has to bring it out. Give him a chance. He called for a conversation and that is all he wants.

A. I told Mr. Davies that my board of directors had directed me to secure early retirement of our certificate of deposit.

The Court: And what did he say?

The Witness: Let me continue.

A. And he said that this could be done with the forfeiture of all accumulated interest and a penalty of 1 per cent of the principal.

Q. Was anything else the subject of conversation with Mr. Davies at that time? [65] A. Yes, Mr. Davies—

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Mr. Youtt: Your Honor, I object to what Mr. Davies said as a matter of hearsay.

The Court: Well, you have allowed some of it in already. The objection is belated, but aside from that a great deal of this has been of that nature, counsel.

Mr. Youtt: Your Honor, I realize that and in this particular case I thought it would be only for brief purposes of identifying the subject matter of the conversation. Beyond that I wish to object to his conversation over the telephone with Mr. Davies.

The Court: Yes. Well, I would allow him to give us the essence of what was said and the objection is overruled.

Just give us what the windup was. What happened as a result of that conversation is all we want to know.

A. Mr. Davies told me that a \$50,000 loan unsecured had been made to Rittmaster, Lawrence & Company based on our deposit being made with their bank. Additionally he said that there was a commission of \$2000 paid to Rittmaster, Lawrence & Company for securing that deposit.

Q. Prior to the time when you spoke to Mr. Davies had you ever heard from any source of any unsecured loan to Rittmaster, Lawrence & Company or to Mr. Rittmaster [64] or to Mr. Lawrence by the Atlantic & Pacific Bank?

A. No, I had not.

Q. Prior to your conversation with Mr. Davies on that date had you ever heard of any commission being paid to any employee of Rittmaster, Lawrence in connection with the deposit being made? A. No.

Q. When was your next conversation with anybody with respect to the certificate of deposit? A. May I refer to the notes?

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The Court: Surely. But not to read it into the record, you see, Mr. Klein. Just to see whether or not it refreshes your recollection and then if your recollection has been refreshed then you can tell us what you remember.

The Witness: I called Mr. Davies on the morning of August 21.

Q. That answers my question.

Between August 8 and August 21 was the certificate of deposit the subject of any conversation between you and any other member of your board of directors? A. It was a continuing thing, but I cannot pinpoint each and every discussion.

【65】 Q. Who did you discuss it with? A. Mr. Eisenberg, the chairman of the board, Mr. Neufeld, executive vice-president, Mr. Cohen, vice-president, Mr. Biegen, director, Mr. Clayman, treasurer. Most of my directors.

Q. Did you tell them anything Mr. Davies had told you with respect to the loans to Rittmaster, Lawrence & Company and the fee? A. Yes, I did.

Q. When did you tell them that? A. I told Mr. Eisenberg and Mr. Beigen immediately and I spoke to Mr. Davies, the same day.

Q. So that on August 8th when you spoke to Mr. Davies, you immediately thereafter telephoned the chairman of your board and your counsel, is that correct? A. That's correct.

Q. What was the nature of your conversation with the chairman of your board and counsel? A. I was very indignant that this had taken place. I felt that we were being used, that we were advised to put our dollars in an institution which was not secure to the personal benefit of our advisor.

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Q. To whom did you state that? A. Both to Mr. Beigen and to Mr. Eisenberg.

【66】 Q. Did you state that to any other member of your board? A. Probably with each and every one to whom I spoke.

Q. Did any member of your board ever tell you that prior to August 8th he had heard that Mr. Rittmaster's firm or Rittmaster was obtaining a personal loan as a result of your deposit? A. No.

Q. You stated that your next conversation with Mr. Davies was August 20th something. A. 21st.

Q. 21st. What was the substance of that conversation? A. I had received back the postal notification that they, the bank had received my letter requesting early retirement, so I called Mr. Davies on the 21st and he informed me that a check for \$99,000 had been sent out via registered mail.

Q. Had been sent out when? A. Via registered mail.

Q. Had he said when? A. Sent out that morning, the 21st.

Q. Did you receive a check for \$99,000? 【67】 A. No.

Q. Did you receive a check from the Atlantic & Pacific Bank in any amount? A. No.

Q. Has any portion of this \$100,000 which you deposited in that bank or which Aid Auto deposited in that bank, has any portion of that \$100,000 to this day been paid by anybody? A. No.

Q. Following August 21st, did you have any further conversations with Mr. Davies? A. Yes. Mr. Davies called me on the morning of August 24th and he advised me that he had received orders from "higher ups" not to pay the \$100,000 because—

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Mr. Youtt: Your Honor, I object to the offering of this evidence for its truth content on the grounds that it is hearsay.

The Court: Objection sustained.

Q. Subsequent to August 24th, did you have any conversations with Mr. Davies? A. Yes. On August 28th.

Q. Was that a telephone conversation? A. At all times, yes, sir.

Q. Who initiated that telephone conversation? [68] A. I did.

Q. Did you speak to Mr. Davies? A. Yes, I did.

Q. What did you say to him and what did he say to you?

A. This was on August 28.

The Witness: I have to go back to something.

The Court: Surely.

A. Mr. Davies had given me the telephone number of Mr. Schweitzer in California, and I called Mr. Schweitzer.

Q. Who was Mr. Schweitzer? A. The president, supposedly, of the Atlantic & Pacific Bank.

Q. Did you try to reach Mr. Schweitzer? A. Yes, I did, on the 24th of August.

Q. Did you succeed? A. I did. I spoke with Mr. Schweitzer.

Q. What was the substance of that conversation? A. The recovery of our certificate of deposit and Mr. Schweitzer informed me that he no longer—

Mr. Youtt: Objection. Again the same grounds.

The Court: What do you say, Mr. Lee? On what basis would this be admissible?

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Mr. Lee: One of the affirmative defenses in [69] this action, your Honor, is that we did not use due diligence to collect our money. It seems to me that that bears directly on the affirmative defenses put in by the defendants as to what we did and the reasonableness of our basis for doing so.

The Court: What do you say?

Mr. Youtt: The issue of diligence, your Honor, to the extent it is a factor and it isn't exactly in those words, but the issue is really what the plaintiff did. He testified what he did. What other people said and the truth or lack of it is irrelevant.

The Court: Objection sustained.

I should think that the answer of Mr. Klein that he endeavored to get from one to the other about this subject matter is sufficient for the purposes that you indicated. It is up to the jury to accept or not the testimony, but he has already said very clearly that in connection with this particular item of deposit he went from one to the other in order to have it paid.

All right, next.

The Witness: Your Honor, may I get my notes? They are more complete than these.

The Court: Surely. He wants to get his notes. Step down and get your own notes.

[70] Q. Mr. Klein, you have picked up from the table certain notes. Can you tell us what those notes are and how they came to be prepared? A. Well, for one thing they are copies of correspondence which I had with the Bahama Bank from the April 3 request for issuance of certificates of deposit until the latter part of the situation.

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The early part of my notes, which would be this grouping here (indicating), covers from March until July. Basically they are recapitulation of the happenings, not written on each day, but at this point in time I became very anxious about the status of our certificate of deposit and I tried from my general notes and from my memory to reconstruct the happenings by time. So this covers that three-month period.

From then on as each individual happening occurred by date, as my conversation took place I indicated the happenings on an individual sheet here.

Q. I show you a copy of a letter dated May 24, 1973, from Aid Auto Stores to Arthur Rittmaster and I ask you whether you sent the original of that letter. A. Yes, I did.

Mr. Lee: I offer it in evidence as Plaintiff's Exhibit next.

【71】 Mr. Youtt: No objection.

The Court: No objection.

I think, gentlemen, I am going to insist on it. The whole purpose of pretrial process is to avoid all of this. Do you have a series of letters?

Mr. Lee: I have four letters.

The Court: You are supposed to show them to him.

Mr. Lee: I did.

The Court: Did he say he would not object to them?

Mr. Youtt: That is right.

The Court: Then the whole group goes in as an exhibit. We don't have to have it all butchered up like this. Why don't you have them all marked and then you can read them to the jury.

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Mr. Lee: I ask that they be marked Plaintiff's Exhibit 4, and I shall read them to the jury.

The Court: Surely. No objection, and that consists of how many separate letters for the sake of the record, just give the dates.

Mr. Lee: Four letters, for the sake of the record, dated May 24, 1973, July 3, 1973, July 18, 1973 and August 8, 1973.

[72] The Court: Thank you.

(Plaintiff's Exhibit 4 was received in evidence.)

Mr. Lee: This is a letter dated May 24, 1973, addressed to Arthur Rittmaster.

(Mr. Lee read letter from Plaintiff's Exhibit 4 in evidence, dated May 24, 1973, to the jury.)

(Mr. Lee read letter dated July 3, 1973, from Plaintiff's Exhibit 4 in evidence, to the jury.)

(Mr. Lee read letter from Plaintiff's Exhibit 4 in evidence, dated July 18, 1973, to the jury.)

(Mr. Lee read letter dated August 8, 1973, from Plaintiff's Exhibit 4 in evidence, to the jury.)

The Court: Have you much more on direct, Mr. Lee, on this phase of the case?

Mr. Lee: A fair amount, I am afraid, your Honor.

The Court: All right, may I suggest you wind it up and then we take a recess and let counsel cross-examine on that phase that you have developed, and then if you want to take up any other phases with Mr. Klein, do so.

Mr. Lee: Very well.

The Court: Does that appeal to you?

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Mr. Lee: Yes, sir, it does.

[73] The Court: Very good.

Q. Mr. Klein, you have taken us through August 24, which I understood you to say was your last telephone attempt to reach someone connected with Atlantic & Pacific Bank, is that correct? A. On that day, yes, sir.

Q. Who was it that you called on the 24th? A. I called Mr. Davies and I then called Mr. Schweitzer.

Q. Did you speak with Mr. Schweitzer on the 24th? A. Yes, I did.

The Court: Was it in connection with the same matter?

The Witness: Yes, sir.

The Court: All right, next question.

Q. What did Mr. Schweitzer say to you and what did you say to him?

Mr. Youtt: Objection.

The Court: Objection sustained.

Q. When was the next time following August 24th that you had a conversation with anybody from the Atlantic & Pacific Bank? A. On the 28th of August. I spoke with Mr. Davies and he advised that Mr. Schweitzer was still the [74] president of the bank and that the order to stop the check had come from a David Woolbridge.

Mr. Youtt: Again I object to the content of the conversation.

The Court: Yes, that is the law. Objection sustained.

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Q. When was your next contact?

The Court: The point is, that was your endeavor, to have payment made on that certificate of deposit, right?

The Witness: Yes, your Honor.

The Court: That was what motivated you in connection with every one of the conversations concerning which you have testified?

The Witness: Yes, your Honor.

The Court: Very well. That is it.

You see, what another person said to you as to what X said to him and what Y said to this one and that one, that doesn't give the other side an opportunity to examine and cross-examine X, Y and Z, who are a part of the conversation you had with Davies or with this one or that one, so the law says nothing doing, you can't get that in.

Is that clear?

[75] The Witness: It is, but Mr. Schweitzer's conversation—

The Court: Don't argue with me. Stay in your field. I thought I explained it to you so that you won't be cursing yourself as to why you can't put it over.

The Witness: You did, your Honor.

The Court: All right.

Q. What was the next conversation you had with anybody following the August 28th date? A. August 29.

Q. With whom was that? A. I spoke with Mr. Rittmaster.

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Q. What did you say to Mr. Rittmaster? A. I discussed the fee which had been paid to an employee of his and he confirmed it. I said that this was a rather unusual thing.

The Court: That is talking about this fellow Iwanier?

The Witness: Yes.

A. He said, "No, it was not an unusual happening."

Mr. Youtt: Again I object.

The Court: No, that I will allow. I will let it stand.

[76] Q. When was your next conversation with anybody connected with the bank or with any defendant in this action?

The Court: About the same matter.

Q. About the same matter. A. The same day I spoke to Mr. Beigen and he said that we should await the \$99,000 check so that we would have evidence of this transaction. I also spoke with a Mr. Ralph Guica, the manager of the Republic National Bank on Fifth Avenue, in order to—

The Court: No, you can't say that. All in connection with the same objective that you already mentioned repeatedly, is that right?

The Witness: Yes, sir.

Q. When was your next discussion with anybody about this matter? A. September 7.

Q. And who was that with? A. Mr. Davies.

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Q. How did that arise? A. I called him.

Q. What did you say to him? A. "I want to know what is happening with our money, with our certificate of deposit." The 99 which he said he had sent and then stopped, which we never received.

【77】 Q. When was your next conversation following that? A. Can I go back to the 7th?

Q. Yes. A. I asked Mr. Davies whether it would be possible for Aid Auto to borrow against our certificate of deposit and he said yes, that we could. I told him I wanted to borrow \$90,000 against my \$100,000 and he said to send him a letter confirming that.

Q. Did you do so? A. Yes, I did.

Q. Do you have a copy of that letter? A. (Handing).

Mr. Lee: Mark this Plaintiff's Exhibit 5.

The Court: No objection?

Mr. Youtt: No objection.

The Court: It is received.

(Plaintiff's Exhibit 5 was received in evidence.)

The Court: Unless you are going to wind it up I am going to take a recess. You said you only had a little bit more.

Mr. Lee: I think you better take a recess, your Honor. It might take a little while.

(Recess.)

【78】 (In open court; jury present.)

The Court: Please proceed, Mr. Lee.

Mr. Lee: I should like to read to the jury Plaintiff's Exhibit 5, which is a letter from Murray Klein

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to Mr. Colin Davies, Managing Director, Atlantic-Pacific Bank, Nassau.

(Mr. Lee read Plaintiff's Exhibit 5 in evidence to the jury.)

Q. Did you cause any inquiry to be made with respect to the standing of the Atlantic & Pacific Bank and Trust Company? A. I don't understand the question.

Q. Did there come a time when you had an investigation or an inquiry made as to the status of the Atlantic & Pacific Bank & Trust Company? A. I believe that was probably accomplished by our legal department.

Q. Did you ask that be done? A. Yes, I did.

Q. Whom did you ask? A. Mr. Beigen.

Q. Did Mr. Beigen thereafter report to you with respect to what he had found out? A. He did, but I do not recall the content.

[79] Q. I show you a copy of a letter on the letterhead of Isaacs, Johnson & Thompson, counsel and attorneys at law, Nassau, the Bahamas, and ask you what the source of that letter was, if you know. A. What do you mean by the source, Mr. Lee?

Q. To whom is that letter addressed? A. To Mr. Henry Rothman.

Q. Where? A. At Booth, Lipton & Lipton.

Q. Who are Booth, Lipton & Lipton? A. They are our corporate attorneys.

Q. Have you ever seen that letter before? A. Yes, I did.

Q. When was the first time you saw it? A. I can't recall.

Q. How did you see it, do you know? A. No. And it may have been read to me. I don't know whether I actually saw the document or I was told of it.

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Q. Are you familiar with the substance of that letter?

A. Yes, I am.

Q. Who made you familiar with the substance of that letter? **[80]** A. I assume Mr. Beigen.

Q. If it were not Mr. Beigen, was it Mr. Rothman, to whom it is addressed? A. It could have been.

Q. Do you know Mr. Rothman? A. Yes, I do.

Q. Is he one of your counsel? A. He is part of the Booth, Lipton & Lipton Company.

Q. And you know who he is? A. Yes, I do. He has worked on many matters for our corporation.

Mr. Lee: I offer this in evidence.

Mr. Youtt: I object, your Honor.

The Court: Mark it for identification, Mr. Clerk.

(Plaintiff's Exhibit 6 was marked for identification.)

The Court: Objection sustained.

Q. Did Mr. Beigen ever report to you following your last conversation with Mr. Davies that you testified to as to the condition of the Atlantic-Pacific Bank?

The Court: Yes or no.

A. Yes.

Q. What did he report?

[81] Mr. Youtt: Objection.

The Court: Sustained.

Mr. Lee: Your witness.

The Court: Would you suffer an interruption for a moment, Mr. Youtt?

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Mr. Youtt: Yes.

(Discussion off the record.)

All right, Mr. Youtt.

Mr. Youtt: Thank you, your Honor. May I inquire whether Mr. Lee is finished on direct now or whether—

The Court: There you start. Please. The Judge says go ahead. Don't start to inquire. You have the ball. Now go ahead, because Mr. Lee is going to give you an answer and it will be another half hour before you get back there.

Mr. Youtt: Thank you, your Honor.

Cross-Examination by Mr. Youtt:

Q. Mr. Klein, have you ever met the individual defendant sitting at the table here, Mr. Cannon? A. No.

Q. Have you ever spoken to him in fact? A. No.

The Court: So the first time you have seen him [82] in your life is today?

The Witness: Yes.

Q. At any time prior to the purchase by your company, Aid Auto Stores, of the certificate of deposit in question, had his name been mentioned to you by any person? A. No.

Q. Had his name, Mr. Cannon's name been mentioned to you in connection with anything related to your business prior to April of 1973? A. Other than the fact that I knew that his firm was part of our underwriting team.

Q. Let me ask you this. You have testified at some length today about matters which Mr. Rittmaster was advising you on, is that correct? A. Yes.

Murray Klein—for Plaintiffs—Cross

Q. Is it correct that you first met Mr. Rittmaster in the year 1972 or was it 1971? A. I believe it was late 1971.

Q. How did it come to pass that you met Mr. Rittmaster? A. A member of his firm had come to my office through one of my franchisees to discuss, I believe it was, insurance matters, and from that conversation we have moved to the possibility of either going public or acquiring [83] an existing automotive chain in Florida, I don't know how it went.

Q. I see, then the first time or the early stages at which you met with Mr. Rittmaster was in connection with the question of your going public, is that correct? A. Actually Mr. Rittmaster and Mr. Lawrence were acquainted with our executive vice-president, Mr. Neufeld.

The Court: I am sorry, I am going to strike that as not responsive.

What is the pending question, Mr. Court Reporter, please?

(Question read.)

The Court: Is that correct?

The Witness: No.

The Court: Next question.

Q. What then was the purpose of your first meetings with Mr. Rittmaster? A. We met with Mr. Rittmaster concerning a firm in Florida with which he and Mr. Lawrence were acquainted and they had five automotive stores in the Miami area and—

The Court: So the Rittmaster talk with you in the beginning was with regard to Aid Auto going into the Florida market, right?

Murray Klein—for Plaintiffs—Cross

The Witness: No, merging.

【84】 The Court: Merging with the stores?

The Witness: Yes, sir.

The Court: We don't need to know all the details.

That was the overall concept of the conversation, is that right?

The Witness: Yes, sir.

The Court: All right.

Q. In connection with that did Mr. Rittmaster offer, either on his own behalf or on behalf of his firm, to perform services on behalf of Aid Auto Stores? A. Yes.

Q. What type of services did he offer to perform? A. He said that this Florida concern was a public company and as a result of the contemplated merger, we would then be a public company.

Q. Whose idea was it originally to enter the area of acquisition of the Florida company, yours or Mr. Rittmaster's? By yours, I am referring to Aid Auto Stores. A. Mr. Rittmaster introduced the Florida company to us.

Q. Was it known that you were in the market for acquisitions or mergers at that time? A. Yes, it was.

【85】 Q. Who initiated conversation as to the question of going public, you or Mr. Rittmaster? A. I believe a blend of both.

Q. Basically going public means setting up your corporation in such a way that you are able to offer shares on the public market to members of the public in general, is that correct? A. Yes.

Q. Is that your understanding of what it is? A. Yes.

Q. Were you interested in the prospect of going public? A. Yes.

Q. Was your interest generated by things that Mr. Rittmaster told you about going public? A. Not entirely.

Murray Klein—for Plaintiffs—Cross

Q. Did Mr. Rittmaster recommend that your firm go public? A. Yes.

Q. Did you at some time later accept those recommendations? A. Yes.

Q. What were the reasons that Mr. Rittmaster told you it would be advisable for your firm to go public? [86] A. Principally to raise additional dollars for a rather extensive expansion program.

Q. Over how long a period did the acquisition of the Florida company take place? A. Five or six months.

Q. During that time were you in regular contact with Mr. Rittmaster? A. Not regularly.

Q. How frequently would you speak with him on the average during a week during that five- or six-month period? A. Possibly once a week, if that often.

Q. What type of information were you relying upon Mr. Rittmaster at that time to provide you? A. Information as to the type of company in Florida, as to the type of individuals that we might become affiliated with.

Q. Prior to that time had you on behalf of Aid Auto Stores or in any capacity engaged in the acquisition or merger with another corporation? A. No, we had not.

Q. Is it a fair statement, then, to say that you were relying upon the expertise of Mr. Rittmaster and his firm in that area during the period of time you were acquiring or merger with the Florida firm? [87] A. To consummate the merger?

Q. Yes. A. We would be guided by his advice.

Q. During that period of time were you represented by counsel? The period of time being the period that you were acquiring or merging with the Florida firm. A. Yes.

Murray Klein—for Plaintiffs—Cross

Q. Incidentally, what period of time was this, approximately? A. I believe it was from the fall of 1971 until May of 1972.

Q. May of 1972 being the date that the acquisition became formal, is that correct? A. Yes.

Q. Incidentally, when did you then go public? A. November 30, 1972.

Q. During the period of fall '71 to May '72 were you represented by counsel? A. Yes, we were.

Q. Was your lawyer the firm of Booth, Lipton & Lipton? A. Yes.

Q. At what time did they become your lawyers? A. Either late 1971 or early 1972.

[88] Q. Were they recommended by you by any individual or firm? A. By Mr. Rittmaster.

Q. In other words, your lawyer then was recommended to you by Mr. Rittmaster? A. Yes.

Q. And on his advice you retained Booth, Lipton & Lipton, is that correct? A. A number of our board members spoke with Mr. Beigen and after that conversation it was their determination that—

The Court: That still doesn't answer the question.

Was it or was it not Rittmaster's suggestion as to the law firm that started the ball rolling to the end that that firm became the attorney for Aid Auto?

The Witness: Yes.

The Court: Next question.

Q. During that period, again referring to late 1971 into May of '72, were you represented by a firm of certified public accountants? A. Yes.

What was the name of that firm? A. William Schoenbach & Sons.

Murray Klein—for Plaintiffs—Cross

[89] Q. Are you still represented by William Schoenbach & Sons? A. There is a successor firm to William Schoenbach & Sons.

Q. What is the name of the successor? A. S-a-f-r-i-s, something else. I don't know complete. They are a new firm.

Q. Are you represented by them at this time? A. Yes, we are.

Q. Also did there come a time when you had to engage the services of an auditor? A. Yes.

Q. Was that someone other than William Schoenbach? A. Yes.

Q. Who was the auditor? A. Laventhal, Krekstein, Horwath & Horwath.

Q. When did you come to engage them? A. I believe the early part of 1972.

Q. Who recommended them? A. Mr. Rittmaster.

Q. When you say Mr. Rittmaster, you are talking about Mr. Rittmaster personally, are you not, as opposed to someone from his firm? A. Mr. Rittmaster personally.

[90] Q. As a matter of fact, though, it was the firm of Rittmaster & Lawrence that was providing services for you during that period, is that also a fact? A. Yes.

Q. After the acquisition or the merger in May of 1972, there was a period of time between then and the time you went public, is that true? A. Yes.

Q. Did Mr. Rittmaster or his firm perform services for you or on behalf of Aid during that period of time? A. Yes.

Q. During that type of services did they perform then? A. Normal discussions about the condition of our stock, of our dollars and certain potential acquisitions.

Q. In other words, they were advising you on a periodic

Murray Klein—for Plaintiffs—Cross

basis as to acquisition possibilities, is that correct? A. That is correct.

Q. Is it a fair statement to say that you were happy with the acquisition which you had recently completed in May? A.. It was too early to tell.

Q. Did there come a time when you were able to [91] assess the value of that acquisition or merger to your firm? A. We feel it was a beneficial acquisition.

Q. So based on that, the recommendation which Mr. Rittmaster gave to you that that would be a possible acquisition was a good recommendation, is that correct? A. Yes.

Q. During that period from May to November of 1972, did your contact, personal contact with Mr. Rittmaster increase or decrease as compared to the earlier period prior to the acquisition? A. It increased.

Q. How frequently would you be in touch with Mr. Rittmaster during that period of time after May and before November 1972? A. Possibly two, three times a week.

Q. Would those be calls which you generated or calls which he generated or both? A. Both.

Q. Would you feel free to call him whenever a particular type of problem arose that you felt he would have expertise in? A. Yes.

Q. What type of problem would that be? [92] A. Well, we were preparing to go public and there were many situations which occurred where I needed his advise, where I needed his counsel and where he needed certain determinations from my firm through me.

Q. As of that time Mr. Rittmaster was not a director of your firm, is that correct? A. No, he was not.

Q. Were you paying Mr. Rittmaster any fees at that time? A. I don't think so.

Murray Klein—for Plaintiffs—Cross

The Court: I think if I may interrupt you, because you are going along very well, your questions are pertinent, but fees, that would lead to him personally, is that what you mean?

Mr. Youtt: I mean Aid Auto Stores paying the Rittmaster firm.

The Court: You have got to be much more specific.

Mr. Youtt: I am sorry, your Honor.

Q. Was the Aid Auto Stores, Inc. paying the Rittmaster firm, Rittmaster & Lawrence or Mr. Rittmaster any fees in connection with the consultations that you were having with him during that period of time? A.. Prior to November 30, 1972?

【93】 Q. Yes. A. No.

Q. Was there any understanding or discussion—let me start with understanding. Were there any understandings at that time that the Rittmaster firm would be an underwriter for Aid Auto in the event that Aid Auto Stores was successful in going public? A. Yes.

Q. And as of the time of going public certain fees were paid to the underwriter, is that correct? A. Yes

Q. Were those fees for past services or future services or both? A. They were for both, past meaning starting with November 30, not prior to November 30.

The Court: Off the record.

(Discussion off the record.)

Q. Incidentally, Mr. Klein, when you initially became involved or related with the Rittmaster firm, when you first were introduced to them did you cause any investigation to be made of their credentials on behalf of Aid Auto

Murray Klein—for Plaintiffs—Cross

Stores? A. Nothing very extensive. I spoke with a number of people in the financial community and ascertained [94] that they were there and they were a fairly good underwriter.

Q. What specifically did you learn about that firm? A. That they had just put through a number of issues very successfully in what I understood was a difficult market. They were able to market securities on a very high level.

Q. You previously referred to them in your testimony as a hot firm. A. I did.

Q. What do you mean by the term "hot"? A. A winner.

The Court: There it is. Next question. You can't improve on that.

Mr. Youtt: No, I don't think so.

Q. As of the autumn months, the late months of 1972 coming up to the period of your actually going public, I take it you were in regular contact on a weekly basis, several times a week, with Mr. Rittmaster, correct? A. Correct.

Q. Is it fair to say that the things which you were discussing with Mr. Rittmaster did not involve directly the operations of Aid Auto Stores? A. Correct.

Q. By "operations" I refer to the day-to-day types [95] of business that you have been in for a long time.

Prior to the time of your merger in May of 1972 and your discussions about that, had Aid Auto Stores been in a position to invest sums of money in certificates of deposit or other securities? A. No.

Q. Prior to the time that—subsequent to the time of the actual merger were funds available to Aid Auto Stores for purposes of investment in securities prior to November 1972? A. No.

Murray Klein—for Plaintiffs—Cross

Q. So it was not until after you went public that funds did become available? A. Yes.

Q. If you know, from where did those funds become available and you went public? A. From the sale of the shares of stock to the public.

Q. So I take it that prior to this time your principal occupation in your position as president of Aid Auto Stores was an operational position, is that correct? A. Yes.

Q. You were concerned with the day-to-day business of running a chain of auto supply stores, is that correct? [96] A. Yes.

Q. So during the time you were discussing your first acquisition, you were relying on Mr. Rittmaster for his expertise in an area in which you had no expertise, is that correct? A. Other than our business expertise.

Q. By "business," you mean your business expertise in running auto supply stores? A. No. The evaluation of whether the merger or acquisition would be a good one for our company.

Q. But the actual technicalities of issuance of stock and trading of stock and things like that were things which you didn't have expertise in as an operational head of an auto supply company? A. Yes.

Q. If you know, where did the funds come from that were available for investment? A. The \$400,000?

Q. Yes. A. It came from the proceeds of the sales of shares of stock to the public.

The Court: He has emphasized that repeatedly.

Q. How many shares were offered, again, at the initial offering? [97] A. 140,000.

Q. When did you first become aware that those moneys—

The Court: I am sorry, may I interrupt you?

Murray Klein—for Plaintiffs—Cross

I thought you told us on direct—what was the 496,000?

The Witness: That actually was the amount outstanding. That was an error.

The Court: Do you see how I am watching?

The Witness: Yes.

The Court: I just want you people to know that these are the methods by which I can claim I was present at the trial.

Mr. Youtt: Thank you, your Honor.

The Court: Would you clear that up, Mr. Klein.

What did you mean by that? Make that clear.

The Witness: Actually I answered the first question in error. We have 496,000 shares outstanding. We actually sold 140,000 to the public.

The Court: Thank you.

Mr. Youtt: Thank you.

Q. When did you first become aware that there would be money available in the general quantity of \$400,000 as you have testified on your direct examination? [98]

A. Probably some time in December of 1972.

Q. How did you become aware of that fact? A. After we paid off all of the very heavy costs of going public and satisfied the needs for short term—short term dollars, we found that we had a surplus of \$400,000 for which we had no immediate need.

Q. Who was it, if anybody, that told you that fact, that informed you of that fact? A. Possibly my auditing department or possibly Mr. Rittmaster, but I would think my auditing department.

Q. When you learned that fact did you consult anybody? A. Yes. We discussed it amongst the executives and the directors as to what now do we do with this \$400,000.

Murray Klein—for Plaintiffs—Cross

Q. Did you at any time consult Mr. Rittmaster in connection with this? A. Yes, I did.

Q. Did you call him or did he call you? A. I can't recall that.

Q. Do you recall whether it was a telephone conversation or an actual meeting? A. I really don't recall.

Q. Did Mr. Rittmaster render you advice as to what to do with the \$400,000? [99] A. A determination was made that we put the money in short term certificates of deposit.

Q. My question was did Mr. Rittmaster render any advice in connection with the investment of the \$400,000? A. I don't know.

Q. What did you then do after that determination was made that you earlier referred to was reached? A. We said we would put the money in short term certificates of deposit and we had already opened our banking line with the National Bank of North America and it was determined that we deposit the \$400,000 there in four \$100,000 notes.

Q. When you say those determinations were made, were they made with the participation of Mr. Rittmaster? A. I assume they were. I cannot say specifically. At least he was aware of them.

Q. When you say he was aware, how did he become aware? A. Probably through a conversation with me.

Q. Was he consulted on a regular basis prior to the time you made a determination as to exactly where you would invest that \$400,000? A. He knew that we were going to invest it and I—

The Court: You see, that is what you can't testify [100] to.

The Witness: It is a difficult question, your Honor.

The Court: That is not evidence.

Murray Klein—for Plaintiffs—Cross

The Witness: It is a difficult question to answer.

The Court: It is difficult, but he has a right to ask it. Here you said you made some money after going public and you felt that you wanted to use that money, to put it to good use, and you had a right to, you and your boys of Aid Auto. Then he has a right to say "All right, what did you decide to do with it?"

Whereupon you said, "We decided to get certificates of deposit."

Am I right so far?

The Witness: Yes, your Honor.

The Court: And he has a perfect right to say who initiated the idea of certificates of deposit. Whether it was Rittmaster or somebody else, and according to you you don't remember who opened the subject of certificates of deposit, is that right?

The Witness: Yes, your Honor.

The Court: But there did come a time, whether Rittmaster opened it up or somebody else did, but the [101] fact remains that certificates of deposit was discussed, the whole matter, with Aid Auto?

The Witness: That is correct.

Q. Did Mr. Rittmaster agree with the placement of the money in the Bank of North America? A. Yes.

Q. I believe you testified that on earlier occasions he had introduced you himself to the Bank of North America? A. Yes.

Q. When Mr. Rittmaster introduced you to the Bank of North America did he tell you on what basis it was that he was making that introduction, why he was recommending that bank over another bank? A. A number of his

Murray Klein—for Plaintiffs—Cross

clients had used the bank. He found them to be a very helpful and very progressive bank. Basically that was it.

Q. Did he take you himself physically to meet an officer of the bank? A. Yes, he did.

Q. Did he then introduce you to that officer? A. Yes, he did.

Q. Did you then have some questions to ask the officer of the bank? [102] A. Yes.

Q. And did the officer answer your questions? A. Yes, he did.

Q. This was in connection with establishing a line of credit at a time earlier than the time of your investment? A. Yes.

Q. At the time that you actually went to the bank or that someone on behalf of Aid went to the bank to make the investment of \$400,000 did further conferences take place in connection with that between people on behalf of Aid and an officer of the bank? A. No.

Q. Did you yourself engage in the actual placement of the \$400,000? A. No. I think my treasurer took care of that.

Q. Did Mr. Rittmaster, at the time he was introducing you to the Bank of North America, state to you in any way that he had personal contacts with the bank, personal business with the bank himself? A. I don't recall.

Q. Did he disclose to you in any way that he had any loans from that bank? A. No, he did not.

Q. Your answer is you don't recall? [103] A. No, he did not.

The Court: No, he said he did not.

Q. Incidentally, during all of this period did you have any contact with Mr. Lawrence, the other half of Rittmaster, Lawrence? A. Yes, in a lesser way.

Murray Klein—for Plaintiffs—Cross

Q. On a lesser way, meaning— A. On less occasions. Mr. Rittmaster seemed to represent the firm to Aid.

Q. Did you have any reason to distrust Mr. Rittmaster and his ability to render the type of advice upon which you were relying at that time? A. No.

Q. At that time being the end of 1972 into early 1973. A. No.

Q. I take it Mr. Rittmaster consented and agreed that the investment of the money was proper in the Bank of North America? A. Yes.

Q. When did the certificate of deposit in the Bank of North America mature? A. I believe the end of March or the first day or two of April, in that period.

[104] Q. That period of time was approximately what, three months or— A. Three months.

Q. Three months. Was there discussion at the time that you purchased that three months certificate of deposit of what you would do at the maturity of it? A. No.

Q. Incidentally, maturity means the time at which you can take the money out, get your interest without penalty, is that correct? A. Yes.

Q. And there are differing periods of time upon which you can purchase certificates of deposit? A. Yes.

Q. Did there come a time when the question of what to do with that deposit of 400,000 arose within the circles of your corporation as it was approaching its maturity date? A. Only through Mr. Rittmaster.

Q. What did Mr. Rittmaster do in connection with that? A. Well, he called me in the early part of March and he ventured that he thought we ought to spread our [105] deposits over a broader base than where we had them right now.

Murray Klein—for Plaintiffs—Cross

Q. Did he explain to you what reasons he had for making that recommendation at that time? A. At that time he said "That will give us a larger base in the event we need a substantial sum of dollars for whatever corporate purposes might come out."

Q. What did you understand him to mean by the term or phrase "larger base"? A. In the event that we were able to successfully come up with a substantial acquisition, then our line of credit at the Bank of North America might not be large enough to carry it.

Q. I take it, then, that it cost more than \$400,000 to finance a substantial acquisition, is that correct? A. A substantial one, yes.

Q. And \$400,000 was basically what you had to work with in terms of funds, free funds at that time, is that correct? A. Yes.

Q. So you were interested in attracting banks to the prospect of backing you in further expansion ventures, is that a fair statement, at that time? A. Yes.

[106] Q. That interest was what Mr. Rittmaster had in mind when he recommended broadening the base of your investment, is that correct? A. This is what he said.

Q. So then in lay terms basically what that meant is that he wanted to make more than one bank happy with Aid Auto Stores for having invested or deposited moneys in it, is that right? A. Yes.

Q. When did Mr. Rittmaster first approach you with that suggestion? A. The early part of March of 1973.

Q. Now we are dealing with a period between November of 1973 and the time I will just pick as the purchase of the certificate of deposit, being approximately April 13. Again I have talked about two previous periods and now let me refer to that period.

Murray Klein—for Plaintiffs—Cross

During that period, after you went public and before the purchase of the certificate of deposit, how would you characterize, in terms of frequency, your contact with Mr. Rittmaster?

The Court: I am sorry, but you made a long summation almost. You better put the question again.

Mr. Youtt: I am sorry, your Honor. I will [107] rephrase it.

Q. During the period from November 1972 to April 1973, how frequently were you in contact with Mr. Rittmaster?

Mr. Youtt: Thank you, your Honor.

A. As frequently as necessary.

The Court: We know, but that is no answer.

Once a week, as you remember, or approximately how often? That is what he means.

The Witness: I would think about twice a week.

The Court: On an average of twice a week, is that correct?

The Witness: Yes, your Honor.

The Court: Thank you.

Q. What subject matter did your conversations and consultations with Mr. Rittmaster concern during that period?

A.. The status of our stock, the discussion about the number of acquisitions which had come to us and the number which had come to him which he presented to us.

Q. In other words, he continued to refer possible acquisitions to you at that time, is that correct? A. Yes.

Murray Klein—for Plaintiffs—Cross

Q. Did any of those conferences include conferences about what to do with your investment moneys? By "investment [108] moneys," I am referring to the \$400,000 you have been testifying about. A. Not significantly. Not that I can recall.

Q. When was it that he first contacted you about the broadening of the base? A. Early March of 1973.

Q. During that time were you relying upon him to give you advice in the areas in which you consulted him and which you just testified about? A. Yes.

Q. Did you have any reason to distrust the advice that he was giving or the ability which he had to give that advice during that time? A. No.

Q. When he consulted you about broadening the base, did you feel that that was an area of his expertise as opposed to an area in which you had expertise? A. Yes.

Q. Did you rely on his advice in the areas of investing that amount of investment money? A. In the manner which he wanted it invested, which he suggested?

Q. Yes. A. Yes.

[109] Q. What did you do in response to his suggestion of broadening the base? A. I discussed it with Mr. Eisenberg, our chairman, and I believe with Mr. Beigen, our attorney.

Q. On the basis of those discussions did you make any decisions as to what you would do or what you would recommend be done with respect to the investment of funds? A. Well, there wasn't a need at that time. May I continue?

Q. A need arose somewhere in late March, is that correct? A. That is correct.

Q. Did you have further conversations with Mr. Rittmaster during that period after he first spoke with you

Murray Klein—for Plaintiffs—Cross

and before you actually made decisions as to what to do?

A. Yes. We met—Mr. Eisenberg and myself were in Mr. Rittmaster's office for some matter, I can't recall, and Mr. Rittmaster presented me with two letters authorizing deposits in two different banks in the amounts of \$100,000 each. The copy which I saw in front of me was addressed to a New Jersey bank requesting that the deposit be made and that the \$100,000 check was enclosed. I assumed that the second letter was of a like content to the Nassau Bank that I had in mind.

[110] Q. Was that the second time that you spoke to Mr. Rittmaster about the question of broadening the base, the first meeting being the conversation that you already testified to? A. I don't recall whether there were any interim conversations. I didn't feel it was very significant at the time.

Q. Do you know whether anybody else on behalf of Aid, any other Aid director or officer, spoke to him about this matter during the interval between those two meetings?

A. Unless it was Mr. Biegen, I know nobody else.

Q. And you don't know whether he did, you are just saying if it weren't for him it wouldn't be anybody else, is that correct? A. That is correct.

The Witness: May I explain something, your Honor?

The Court: I am afraid not. I am sorry.

Q. You spoke before about a Hempstead, Long Island, bank, is that correct? A. Yes.

Q. That was a subject of discussion I believe which Mr. Rittmaster initiated to you at some earlier time? A. Yes.

[111] Q. When was that again? A. In October of 1972.

Q. Prior to going public? A. Yes.

Murray Klein—for Plaintiffs—Cross

Q. What did he say about that? A. He called me and said that if it were at all possible he would like me to start a bank relationship with the Hempstead National Bank of Nassau County, New York.

Q. Did he give you any reasons for that suggestion? A. No, he did not.

Q. Did he tell you at that time that he had any personal accounts at that bank? A. He did not.

Q. That he had any loans at that bank? A. No, he did not.

Q. So when he called you later about the broadening of the base, he told you he wanted the base broadened and you didn't have any conversations with him and he handed you two letters, I believe, requesting the deposits be entered at two separate banks, is that correct? A. Yes.

Q. Did you prior to that occasion discuss the names of the banks with Mr. Rittmaster? A. No. I think it was by geographical designation, [112] New Jersey and Nassau.

Q. He said New Jersey and Nassau on the first occasion, then, is that a fact? A. In our initial conversation, yes. He said a New Jersey bank and in a Nassau bank.

Q. Did he give you any particulars as to which bank in those areas he was referring to? A. No, he did not.

Q. At your second meeting with him, the meeting at which he handed you the letters, did he discuss the exact banks that he was addressing the letters to? A. No, he did not. We were there for another mission and this was rather aside—

The Court: I am sorry. Strike—

A. No, he did not.

The Court: Strike that last part, "We were there on another mission," or something. That will be stricken and the jury will disregard it.

Murray Klein—for Plaintiffs—Cross

Q. Prior to the second meeting where he handed you those letters, had you ever told him that you had determined to take his advice and broaden your base? A. I assume that we did.

Q. You assumed because he had those letters ready? A. Yes.

【113】 Q. Is there any other basis of your assumption? A. I was in accord with it.

Q. You say you personally was in accord with it? A. The corporation was. The company was.

Q. Had the company taken any action, in a board of directors meeting or in any other official way, to formalize that? A. No. We were in between board meetings at the time the decision had to be made.

Q. So there was no specific meeting at which it was taken up prior to the time Mr. Rittmaster gave you the letters requesting deposits? A. No.

Q. The letters, were they for your signature or were they signed by Mr. Rittmaster? A. The actual final letter was signed by me.

Q. What did he give you on the date which we have been talking about? A. A draft of a letter.

Q. A draft of a letter? A. Yes.

Q. That he had written for you to copy on Aid Auto Stores stationery? A. Yes.

【114】 Q. I take it from your testimony previously you didn't discuss the contents of those letters or their addresses at your meeting with Mr. Rittmaster? A. No.

Q. And you didn't even look at the letters he gave you, is that correct? A. Superficially.

Q. Superficially— A. The top one.

Q. I am sorry? A. Superficially on the top one.

Q. What was on the top? It was addressed to the New Jersey Bank-N.A. Paterson, New Jersey.

Murray Klein—for Plaintiffs—Cross

Q. There was a second letter also, wasn't there? A. Yes, there was.

Q. That was addressed to the Nassau, the Bahamas, wasn't it? A. Yes.

Q. But you didn't notice it at the time? A. I didn't look at it.

Q. Did you know at the time, the time being of your meeting with Mr. Rittmaster at which he gave you these letters. Did you know that that is what those letters [115] were for, to broaden your base and expand your investment? A. That was the purpose.

Q. So you understood that at the time you were at the meeting? It wasn't that he just handed you a piece of paper that you knew nothing about?

The Court: In other words, you knew that what he handed to you had a direct relationship to that subject matter? That is all he wants to know.

The Witness: Yes.

The Court: You just didn't examine the letters with care on that occasion?

The Witness: Yes, your Honor.

The Court: Yes, your Honor.

Q. At a later time you did have occasion to look at the letters in detail, is that correct? A. Yes.

Q. It was at that point that you learned that the one letter was addressed to a bank in Nassau, the Bahamas, is that correct? A. Yes.

Q. What did you do upon learning that information? A. I immediately called Mr. Biegen and gave him that information and requested his advice. Mr. Biegen is our attorney.

[116] Q. At that time was Mr. Biegen also a director of your corporation? A. Yes.

Murray Klein—for Plaintiffs—Cross

Q. Did he become a director of your corporation after he became your attorney? A. Yes.

Q. Did your corporation at that time and does it now pay Mr. Biegen's firm legal fees? A. Yes.

Q. At the same time Mr. Biegen is a member of your board of directors, is that right? A. Yes.

Q. Does he receive any compensation for being a member of the board of education?

The Court: Of the board of education?

Mr. Youtt: I am sorry. It is another one of my interests, your Honor.

The Court: I gave you a wonderful chance and you picked it up fast. That was pretty clever, counsel.

A. Yes.

Q. He receives compensation as a board member, is that correct? A. As a director.

Q. I take it that all directors receive compensation [117] for serving in that capacity? A. Yes.

Q. What did you do? My question was what did you do after you learned the names of the banks and that one was in the Bahamas? A. I called Mr. Biegen and informed him of the fact that the second bank was a bank in Nassau, Bahamas, and what exactly should I do about it. I wasn't at all certain I was on solid ground.

Q. And you were advised that you weren't to do anything until you heard from Mr. Biegen, is that correct? A. Yes.

Q. Did Mr. Biegen also advise you that his firm had contacts in the Bahamas in connection with other matters which they were dealing in? A. Yes.

Q. Did a period of days pass after your conversation

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with Mr. Biegen concerning this subject matter? A. A number of days.

Q. Did then Mr. Biegen get back to you on this matter? A. Yes, he did.

Q. And he advised you to go ahead with the placement of this certificate of deposit? A. Yes, he did.

[118] Q. At any time prior to this time, the time which Mr. Biegen got back to you, had you discussed with Mr. Rittmaster the question about foreign investors that you testified to on direct examination? A. Yes. It was either the first or second time in March I met with—no. It was after we learned or after I learned that it was a Nassau Bank, Nassau, Bahamas, that Mr. Rittmaster told me the reason for that was that there were foreign investors who would possibly engage in the purchase of stock of U.S. corporations, but they wanted to work through foreign banks rather than domestic banks.

Q. How did that subject come up? A. It came up when I discovered it was a Nassau, Bahamas bank and I spoke with Mr. Rittmaster about it, telling him that my original assumption was that it was a Stateside, Nassau, New York bank.

Q. That conversation, did that come before or after your first conversation with Mr. Biegen about this matter? A. I can't recall. It was possibly the same day.

Q. The same day as you requested— A. Possibly, I can't recall.

Q. It was at that time that Mr. Rittmaster explained to you his strategy for choosing the Bahamas bank as opposed to a local United States bank?

[119] Q. Has there been any other prior occasions when you spoke to Mr. Rittmaster about the question of attracting foreign funds for your acquisition campaign? A. No.

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Q. At the time that you discussed this matter with Mr. Rittmaster did you voice any opinion as to the advisability of going ahead and doing this or whether or not you approved? A. I wasn't certain that I approved and I questioned the advisability and asked Mr. Rittmaster what he knew about the bank or the people in the bank.

Q. Did he explain anything to you about that he knew? A. I don't remember whether he told me or whether he told Mr. Biegen and whether I received it second-hand from Mr. Biegen.

Q. Were you sure that he had investigated the bank on the basis of your conversation with Mr. Rittmaster? A. I felt that it was satisfactory to him before he advised me to deposit the money there.

Q. Did you understand the thinking of Mr. Rittmaster in terms of placing a certificate of deposit or purchasing a certificate of deposit in the Bahamas bank and its relation to the attraction of foreign investment for your [120] acquisition campaign? A. I understood the reasoning. I didn't know whether I would be as confident of the results as he seemed to be.

Q. In other words, you didn't know that it would work to attract foreign investment funds? A. Right.

Q. Did you question Mr. Rittmaster about that? A. Yes, I did.

Q. Was he able to give you a satisfactory explanation of his reasoning, satisfactory to you at that time? A. I assume it was satisfactory because I went ahead with the deposit.

Q. In going ahead with the deposit you were basing your decision upon the advice Mr. Rittmaster gave you about broadening the base into foreign markets, is that correct? A. That was one. I actually did not go ahead with the

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deposit until my legal department told me that it was proper.

Q. So you were also relying upon your legal department's investigation, too, is that correct? A. In this instance more so than on my financial department.

【121】 Q. Did you know at that time that Mr. Rittmaster had had previous contacts directly with the firms of the bank, the Bahamas bank? A. No, I did not.

Q. Did you ask him about that? A. Yes.

Q. Did he provide you with answers? A. He said he knew a Mr. Schweitzer.

Q. Did he explain to you that Mr. Schweitzer was the president of the bank? A. Yes, he did.

Q. Did he say that he knew anybody else in connection with the bank? A. Not that I recall.

Q. Did he tell you that anybody in his firm on behalf of his firm was looking into the bank as an investment? A. Not that I recall.

Q. Did the name Emanuel Iwanier come into the conversation at any time during this period? A. No, it did not.

Q. When did you first learn the name Emanuel Iwanier? A. On August 7th, if I recall.

Q. Later than August 1973? A. Yes.

【122】 Q. Several months later? A. Yes.

Q. Did you learn that Mr. Iwanier was in fact an employee of the Rittmaster, Lawrence firm?

The Witness: I am in error, your Honor.

The Court: You may correct it.

A. I learned about him through Mr. Rittmaster and I believe it was August 29th, at which time I spoke with him

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regarding a fee. It was then that Mr. Iwanier's came in. On August 7th I became aware a fee was paid, but I didn't know to whom.

Q. Getting right down to the period of time in which the decision was made to purchase the certificate of deposit, I take it that after you spoke with Mr. Rittmaster in detail about why choosing the Bahamas bank as opposed to the Nassau County bank and after getting the go-ahead from your law firm you authorized the certificate of deposit to be purchased, is that correct? A. That is correct.

Q. That was prior to the approval of your board of directors, is that correct? A. That is correct.

Q. Incidentally, at this time Mr. Rittmaster was a member of your board of directors, is that also correct? [123] A. Yes.

Q. When did he become a member? In January I believe you testified. Do you recall the date? A. I believe it was January 1973.

Q. Would January 25 refresh your recollection? A. I really can't say.

Q. If I were to hand you a copy of the minutes of the meeting— A. That would refresh me. Yes.

Q. January 25th is the correct date? A. Yes.

Q. And you had also spoken to Mr. Biegen who was also a member of the board of directors, is that correct? A. And Mr. Eisenberg, who was the chairman of the board.

Q. Was it with his approval that the certificate of deposit in the Bahamas bank be purchased? A. He approved it, yes.

Q. So now we have the approval of Mr. Eisenberg, yourself, Mr. Biegen and Mr. Rittmaster—that is four people, if my count is correct—prior to the actual placement of the certificate of deposit. Was there anybody else that you con-

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tacted, a board member or board members who approved this prior to your authorizing it? [124] A. I can't recall.

Q. How many members are there on your board? A. Nine.

The Court: Not present tense, then.

Mr. Youtt: Thank you, your Honor.

Q. Were there at that time nine members also? A. Either nine or 10. I think Mr. Rittmaster may have made it 10.

Q. In other words, Mr. Rittmaster would be added to the number of people reflected on your prospectus as being members of the board and that would be the number of directors in March and April of 1973? A. Yes.

Q. When you authorized the purchase of the certificate of deposit in the Bahamas bank did you also authorize the purchase of a certificate of deposit in the New Jersey bank? A. Yes.

Q. Do you recall the name of the New Jersey bank? A. New Jersey Bank N.A.

Q. Just New Jersey Bank of North America? A. Yes.

Q. Had you ever heard of that bank prior to March of 1973? [125] A. No, I had not.

Q. Did you learn anything about that bank prior to actually ordering the certificate of deposit in the amount of \$100,000 from it? A. Only through Mr. Rittmaster.

Q. What did you do to ascertain facts about that bank from Mr. Rittmaster prior to placing the certificate or purchasing the certificate? A. I believe Mr. Rittmaster said that he had had some dealings with the bank.

Q. Personal dealings, if you recall? A. I don't really know.

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Q. Did he tell you whether or not he had received loans from the bank? A. I don't recall.

Q. Did he tell you whether or not he was a member of any executive committees or boards of directors of that bank? A. Not to my knowledge.

The Court: Then as you best recall it his overall suggestion with regard to that particular banking institution was sufficient for your purposes?

The Witness: Yes, your Honor.

The Court: Without going into any details you [126] relied on him so that his general suggestion in a general way rather was sufficient for you to have gone ahead with regard to obtaining the certificate of deposit from that particular New Jersey institution?

The Witness: Yes, your Honor.

Q. I take it you yourself didn't go into any further investigation? A. No, I did not.

The Court: If you want to batter it around, okay, but I always believe when you get something leave it alone.

Mr. Youtt: Thank you, your Honor. I will leave it alone.

Q. What did you do with the other \$200,000 at that point? As I see it, you have \$200,000 left over. A. That remained at the National Bank of North America.

Q. Did you have to do anything in connection with contacting that bank to renew those certificates of deposit? A. Yes.

Q. What did you do? A. I assume my treasurer filled out whatever papers had to be filled out to get it renewed.

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Q. At the time when you initially invested the [127] \$400,000 in the Bank of North America, did you have a line of credit with the Bank of North America? A. Yes, we did.

Q. Did you also have any loans, you meaning Aid Auto Stores, outstanding from the Bank of North America? A. At which point in time?

Q. At the time that you initially invested the \$400,000, December or January of 1972-'73. A. I think we had cleared up all of our bank obligations prior to the investment.

Q. Subsequent to the investment and while it was in full effect, the \$400,000, did you incur any loans from the Bank of North America? A. Are you talking about the first quarter of 1973?

Q. That's correct. A. I do not think so.

Q. Incidentally, a line of credit merely means the amount that a bank agrees to stand behind you on in the event that you need to use that money, is that correct? A. Yes.

Q. So that if a bank gives you a line of credit of \$1000, that means you can go out and incur indebtedness against that line of credit up to the amount of \$1000? [128] A. Yes.

Q. The amount of the line of credit that you had with the Bank of North America was in excess of \$1000 I take it? A. Yes, it was.

Q. At the time when you placed the \$400,000 in that bank did your line of credit increase or decrease during that period, the maximum line that the bank was willing to support you on? A. I don't think there was any substantial change.

Q. Was there any discussion about the possibility of obtaining loans or increasing your line of credit in light of

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the fact that you had invested the \$400,000 with that bank?

A. None that I recall. There was no need at the time.

Q. There was no need for funds on your behalf? A. Correct.

Q. In order to get the \$200,000 out to get to the other banks what did you have to do with respect to the Bank of North America? A. I would assume the normal procedures which are necessary for a withdrawal.

Q. I take it you personally did not engage in any [129] those transactions? A. No, I did not.

Q. So what you did in order to deposit the moneys of \$100,000 each in the New Jersey bank and the Bahamas bank, was to write the letters in the form they were given to you by Mr. Rittmaster, is that correct? A. Substantially.

Q. Did you do that on April 3, 1973? A. April 3 for the Nassau Bank and April 4 for the New Jersey bank.

Q. So you were a day ahead for the investment in the Nassau Bank, is that correct? A. Yes.

Q. On April 3 you mailed a check for \$100,000 to the Nassau Bank? A. That is correct.

Q. Did you make any effort to contact any officers of the bank contemporaneously with your sending the \$100,000 to the bank? A. Personally?

Q. Yes. A. No.

Q. Did you order anybody else to do that? A. No, I did not.

[130] Q. A week or so passed until you heard from somebody in connection with that check, is that correct? A. Yes.

Q. Who was it that you heard from? A. Mr. Rittmaster.

Q. He called to tell you that the bank had not received the check, is that right? A. He called to ask me whether I had in fact sent out the check, and I said yes.

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The Court: When you read the cold record you will find that people of intelligence would have difficulty in knowing what bank you are talking about. When the witness' answer includes more than one institution and the subsequent questions do not positively nail down the bank or the one of the two that have been mentioned, you will find that it is a very, very uncertain situation, especially where you are going to advocate that that was his answer with regard to the Bahamas bank. So I think you better always say Bahamas when you refer to that institution.

Mr. Youtt: Thank you, your Honor.

The Court: That is just a suggestion.

Mr. Youtt: I appreciate it.

The Court: While we have interrupted you, can you give me a general idea of about how long? There is one [131] thing I believe in, that when a person like you and Mr. Lee go about their business, expeditiously, I don't like to butt in except where I feel that I should, so I am not butting in. I think you ought to have your full chance, both of you, but I have other cases, too. I believe in giving every case its full share, but not to allow any case to take advantage and I know neither one of you are purposely doing that.

Give me an idea of how much more you have?

Mr. Youtt: I think possibly a half hour, your Honor.

The Court: Okay. That is a straightforward answer. Thank you very much.

Go forward for a bit, but we won't sit beyond the next ten minutes.

Mr. Youtt: Thank you, your Honor.

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Q. You learned from Mr. Rittmaster that the check had not been received. Did you learn from Mr. Rittmaster also how he had found that fact out? A. No.

Q. Did you ask him? A. I don't recall.

Q. Was this in a telephone conversation? A. Yes.

[132] Q. Approximately what date, again? A. On April 11.

Q. Two days before the 13th? A. Yes.

Q. His advice to you at that time was to issue another check which would be delivered to his office in order that he personally could give it to the president of the Bahamas Bank, is that correct? A. Not entirely.

The Court: In what respect or respects is it not?

The Witness: He said to put a stop order on the first check, which was mailed to the Bahamas, and then followed through with what you had said.

Q. Did you have any reason at that time, based upon the fact that the bank hadn't received the check, to question the wisdom of investing in the Bahamas Bank? A. No.

Q. So the fact that the check didn't arrive did not cause you to become suspicious, is that correct? A. No.

Q. Again you were relying upon Mr. Rittmaster in these transactions, is that correct? A. Yes, but I had sent the check down registered **[133]** mail with a return receipt and that had never come back from the U.S. Post Office. So I felt it hadn't arrived.

Q. I take it that when you issued the stop order you ascertained that the check had not been presented for collection to your bank? A. Yes.

Q. When Mr. Rittmaster spoke with you about this he told you that Mr. Schweitzer, the president of the bank,

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would be in his office on Friday, that coming Friday, is that right? A. Yes.

Q. Again when I referred to the bank in that case and in the prior questions, it was the Bahamas Bank and I should have said it then.

The Court: And you so understood?

The Witness: Yes.

Q. Did you speak with Mr. Rittmaster on that occasion about the possibility of yourself meeting with Mr. Schweitzer? A. No, I did not.

Q. Did you ask or instruct Mr. Rittmaster to do anything in connection with the placement of the money in the Bahamas Bank on that occasion, the 11th of April? A. Did I instruct him?

[134] Q. That is correct. Or did you ask him to do anything? A. I don't follow the question entirely, counselor.

Q. You knew that he was going to meet with the president of the bank on that coming Friday? A. Yes.

Q. He had suggested that at that time he hand-delivered a check representing the investment in the certificate of deposit, correct? A. Yes.

Q. Did you have any conversation as to what else he would do, if anything, besides delivering the check? A. Not that I recall.

Q. I take it from your direct examination that you did cause the check to be issued and sent over to Mr. Rittmaster's office, is that correct? A. No. Mr. Rittmaster sent a messenger to my office.

Q. That was on Thursday, the 12th of April? A. That was on the 12th.

Q. Did you have any contact with Mr. Rittmaster on the 12th of April? A. None that I can recall.

Q. How about on the 13th? **[135]** A. Yes.

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Q. Friday, the 13th. A. I spoke with him on the 13th after the bank had called me for certification of the \$100,000 check.

Q. So the chronology, if I may, on that date was that the Bank of North America, your bank, called you and said, "Can we certify this check which you have issued to the Bahamas bank?"

And you then responded that you would get back to that bank with an answer, is that correct? A. That is correct.

Q. At the same time you also ascertained from that bank who it was that was requesting that? A. That is correct.

Q. It was a phone call, I take it? A. That was a phone call from an employee of the bank.

Q. In that phone call, that same phone call, did you speak also with Mr. Schweitzer? A. Yes, I did.

Q. At that time you knew that Mr. Schweitzer was the president of the Bahamas bank, did you not? A. Yes, I did.

Q. What was the total subject matter of your [136] conversation on that first occasion with Mr. Schweitzer? A. I don't recall fully. I think it basically attached itself to the need for certification of the check. I don't know what other pleasantries we exchanged.

Q. Did you ask him any other questions about his bank at that time? A. Not that I recall.

Q. Then after that telephone conversation you ascertained certain things about the condition of your bank account from your own treasurer, I believe your testimony was, is that correct? A. That is correct.

Q. And then called Mr. Rittmaster, is that correct? A. Yes, I did.

Q. Did you at that time speak with Mr. Rittmaster about his conversation with Mr. Schweitzer of that day? A. No, I did not.

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Q. Did you ask Mr. Rittmaster any further questions about the nature of the bank or anything concerning the Bahamas bank? A. Not that I can recall.

Q. And you spoke again on that day by telephone to Mr. Schweitzer, the president of the Bahamas bank, is that correct? [137] A. That is correct.

Q. That was for the purpose of telling him that you could not certify the check, is that correct? A. That is correct.

Q. Did you have any further conversation with Mr. Schweitzer on that second occasion with respect to anything else concerning the bank or your investment of \$100,000 in the bank, the Bahamas bank? A. Not that I recall.

Q. Do you have any notes of conversations which could refresh your recollection? A. No. At this point in time I didn't feel there was a point for me to make notes.

The Court: Have you finished that particular item of cross?

Mr. Youtt: Yes, I believe so, your Honor.

The Court: I think it might be a good idea not to pick something else up which you won't be able to finish.

Number 1, we are going to adjourn to ten o'clock promptly tomorrow morning. I come down on the subway, ladies and gentlemen. I do not have a car and chauffeur. I go through the same kicking around—and that language is literal—that you are subjected to and I make arrangements [138] to be on time so that I can get over that kicking around. It takes a little time to sort of adjust, you know, so will you please remember that the absence of one holds

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us all up. I direct that you all be here tomorrow morning on the dot at ten o'clock.

Good night, ladies and gentlemen.

(Jury left the courtroom.)

The Court: I want to thank counsel for their courtesy to one another and their courtesy to the Court. May I ask you to be good enough with respect to any future pieces of evidence to sort of do what you did toward the close of the direct examination of the instant witness.

Will you please get concessions and let's move with the door, because when you take that last batch of letters, when you show each one to Mr. Klein, he has to read it, you have to give him a chance to look at it and then you ask, "Did you write this?" Then he looks at it because he wants to be sure of himself. And then you do the same with the next letter. It takes time and that time is all we lawyers have got. So will you please get together on a lot of this stuff, and I know you will. It makes it far more intelligent, and don't forget, you have human beings in that box. They grow weary with some of this long-drawn out business. Sometimes they wonder why [139] you don't consolidate it. Why did he do this, that and the other.

So to keep their interest in a cut and dried case like this, as distinguished from a criminal case—you don't have guys shooting all over the lot and murder and blood. That is akin to television, so they keep themselves alert.

All right, good night.

(Adjourned to Wednesday, November 20, 1974,
at 10:00 A.M.)

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[140]

73 Civ. 4890

AID AUTO STORES, INC.,

v.

HERBERT S. CANNON, *et al.*,

v.

MURRAY KLEIN, *et al.*

November 20, 1974

10:00 A.M.

(Trial Resumed)

(In open court—jury present)

MURRAY KLEIN, resumed.

The Court: Mr. Klein, you recognize that you are continuing with your testimony under oath without the necessity of being re-sworn.

The Witness: I do, your Honor.

The Court: Please proceed with the cross examination.

Mr. Youtt: Thank you, your Honor.

Cross Examination by Mr. Youtt (continued):

Q. Mr. Klein, briefly summarizing your testimony of yesterday, is it a fair statement to say that as of **[141]** the months of February, March and April of 1973 you were confident that Mr. Rittmaster was capable of obtaining the information necessary in order to make wise judgments and advise you accordingly on investments that you

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would make on behalf of Aid Auto Stores, is that a fair statement? A. Yes, sir.

Q. It was only later that your judgment of him changed based upon things that you later discovered, is that right?

A. Correct.

Q. Did Mr. Rittmaster at any time tell you that it was a common practice for banks with which he did business, either individually or on behalf of his company, to extend loans to him in return for his generating the placement of deposits with those banks? A. No, sir.

Q. Mr. Klein, I believe you are a director of Aid Auto Stores also, is that correct? A. Correct.

Q. Are you the chairman of the board of directors? A. No, I am the president.

Q. But you attend regularly board of directors meetings, is that correct? [142] A. Yes, I do.

Q. There are occasions, are there not, where members of your board of directors are also related to businesses that are receiving monies in the form of fees from your corporation, is that right? I believe you testified about Mr. Biegen yesterday. A. Yes.

Q. Do you ever have occasion in your capacity as director to enter into discussions during directors meetings and to pass upon resolutions approving the payment of fees to entities which have an official or a partner in them also being a member of your board? A. Yes.

Q. That happens on regular occasions, does it not, on occasions when members of your board are also related to businesses with whom Aid is doing business? A. Yes.

Q. That's not an unusual occurrence, is it? A. No.

Q. It comes about, does it not, by either the member who is related to that entity bringing it to the attention of the board or the board learning about it merely by virtue of the fact that everybody knows it, is that correct?

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In the case of Mr. Biegen, he doesn't [143] have to tell you that he is a partner in the firm that represents you.
A. That is correct.

Q. I am going to hand you Exhibit 1 and ask you to refer to it on a couple of questions that I will ask you.

Exhibit 1 is the prospectus which was issued by Aid Auto Stores in connection with the public offering, is that correct? A. That is correct.

Q. In that prospectus are the basic facts about the corporation and its activities relevant to the corporation are stated as being true and correct to the best of the knowledge of the people who were issuing it, is that correct? A. That is correct.

Q. You had a hand in issuing it, I take it, in view of the fact that you were president at the time, is that correct? A. That is correct.

Q. I direct your attention to the bottom of page 1, the front page of the exhibit, in which discussing the payment to the firm Rittmaster, Lawrence & Company which is referred to as "The Representative" is that [144] not correct? A. That is correct.

Q. The prospectus sets forth that "certain other payments will be made" and also "a non exclusive five year agreement under which the representatives will receive on all acquisitions or mergers initiated by it or in which it participates or assists upon written requests of the company, a commission to be negotiated at time of introduction of such initiation."

Are you familiar with that language? A. Yes, I am.

Q. What does that commission mean? A. A fee to be paid to the Rittmaster, Lawrence Company in the event that they were instrumental in securing an acquisition which was made, provided that we asked them to come in on the negotiations.

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Q. In other words, you were agreeing or you were recognizing that you had agreed in drafting this prospectus to pay Rittmaster, Lawrence & Company not only the \$44,000 to be your financial advisor, but you were also agreeing to pay them a commission for whatever acquisitions they brought to you, is that correct? A. Acquisitions, yes, sir.

Q. And those acquisitions, at the time that they [145] took place, the commission would then be separately negotiated between your firm and the Rittmaster firm, is that correct? A. That is correct.

Q. And those commissions would be in addition to the \$44,000 and whatever other benefits Rittmaster Lawrence was receiving, is that correct? A. That is correct.

Q. Now directing your attention to page 22 of the same document, the first full paragraph, in which it states—I think the final sentence of that paragraph states “The representative and the company have agreed that for a period of five years, the representative will, on a non-exclusive basis, receive, on all acquisitions, mergers or similar public combinations consummated by the company which were introduced or initiated by the representative, a commission to be negotiated at the time of such introduction or initiation.”

That refers to the same agreement that we have been talking about, is that correct? A. I believe it does.

Q. Changing the subject somewhat, but in-the same paragraph, the first sentence of the paragraph reflects that “The company will elect a nominee of the representative, [146] of Rittmaster, Lawrence, to the board of directors,” is that correct? A. Yes, sir.

Q. The second sentence then states, “The representative has advised the company that it has no present in-

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tention of exercising its right to designate such nominee."

Is that a true statement as of the time that it was entered in the prospectus? A. To my knowledge it was.

Q. So that at the time the public offering became effective in November of 1972 there was no present intention on the part of Rittmaster, Lawrence to nominate a member of the board of directors under this agreement? A. They so state.

Q. When was it that they did determine to elect or to nominate a member of the board of directors? A. I believe it was in January of 1973.

The Court: Be a little bit more specific. When was it that Aid Auto decided or determined upon having a director of the Rittmaster firm become a director of Aid Auto?

Mr. Youtt: I believe the formal action, as Mr. Klein testified, was January 25, 1973.

Q. Is that correct? [147] A. That is correct.

The Court: That is giving me a date, but is that what you are after? Is that the question?

Mr. Youtt: I will ask another question.

Q. When did Rittmaster, Lawrence inform Aid Auto Stores of its desire to have a nominee appointed to the board of directors in the prospectus? A. I believe it was in January of '73 because the action was taken in January of '73.

The Court: All right.

Q. It would be sometime prior to January 25? A. Yes, it would be.

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Q. But you don't recall exactly when? A. No, I do not.

Mr. Youtt: I would like to offer in evidence—

The Court: First have it marked for identification,, would you please, Mr. Youtt?

Mr. Youtt: Yes.

(Defendants' Exhibit A was marked for identification.)

Mr. Youtt: Defendants' Exhibit A I have discussed with my adversary.

The Court: And you have no objection?

Mr. Lee: No objection.

【148】 The Court: Then you automatically offer it in evidence.

(Defendants' Exhibit A received in evidence.)

Q. Showing you Defendants' Exhibit A in evidence do you recognize that as being the agreement entered into between Rittmaster, Lawrence and your company, the financial consulting agreement? A. Yes, I do.

Q. What is the date on that? A. December 19, 1972.

Q. I take it in entering into that agreement it was never contemplated that Rittmaster, Lawrence & Company would use its exclusive efforts to work for or represent Aid Auto Stores, Inc., is that a fair statement? A. You said they would not.

Q. They would continue in the general business in which it had existed prior to entering into that contract with you, is that not correct? A. Yes.

Q. You were not demanding their exclusive attention under that agreement? A. That is correct.

Q. It was merely an agreement whereby they would

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[149] be available to provide you with financial advice and assistance, is that correct? A. That is correct.

Q. And also advice and assistance in connection with acquisitions and mergers? A. That is correct.

Q. Incidentally, what is the status of the Rittmaster, Lawrence firm now? A. They are not in business, I understand.

Q. Do you know how long it has been since they have not been in business? A. I believe the latter part of 1973 or the early part of '74. I can't pin it exactly.

Q. Now, Mr. Klein, I am handling you Plaintiff's Exhibit 3 and I believe you have identified that as being the financial statement that was supplied to you by Mr. Rittmaster on or about May 25, 1973? A. That is correct.

The Court: The financial condition of what? The jury isn't seeing it and they can't retain in their memory what that really is unless you remind them.

Mr. Youtt: I am sorry, your Honor. The combined financial statement of the Atlantic Pacific Bank and Trust Co., Ltd., the bank we have been referring to as the Bahamas Bank.

[150] The Court: All right.

Q. That is the statement Mr. Rittmaster gave you on May 25, is that not correct? A. Correct.

Mr. Lee: I'm sorry, but I think there is a misapprehension, because if Mr. Youtt would read the full statement you will see that is a combined statement of two banks.

Mr. Youtt: It refers to two banks, yes, The Atlantic-Pacific Bank & Trust Co., Ltd and Newport Bank of Nassau, Ltd.

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Q. Would you tell the Court and jury what it was in that statement that caused you to become dissatisfied with your investment in that bank? A. Well—

The Court: Which bank? You yourself say it covers two banks.

Mr. Youtt: I don't think there has been any testimony as to—

The Court: You are absolutely right, but make it absolutely clear. It never hurts.

Q. In the Bahamas Bank. A. For one thing, it was my belief and understanding that we were depositing in the assets of the Atlantic & [151] Pacific Bank & Trust Company and when this was received I noted it showed the assets of two banks. It showed \$3,600,000 in assets, of which it had a qualifying statement at the bottom that of that amount two million, one was due from depositors of the predecessor bank.

Q. Did it state the name of the predecessor bank? A. It did. The Farmers & Merchants Trust Company, Ltd. of Canada.

Q. The other named bank, the Newport Bank at the top, did you later learn that that was just the name of the resident bank that was necessary under Bahamas laws and really it was virtually the same entity? A. No. This was never explained to me.

Q. With respect to the other bank that you named, would you name that again? A. The Farmers & Merchants Trust Company, Ltd. of Canada.

Q. Would you read the note that's relevant to that particular entity on that statement. A. Of this amount, referring to the three million, six assets the sum of \$2,115,470.43

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is due from Farmers & Merchants Trust Company, Ltd. of Canada, our predecessor in interest on account of the purchase on October 31, 1972 of all the assets and deposits of their Nassau branch [152] operation.

Under the terms of this agreement deposits are transferred to us as written consents are received from depositors.

Q. Now, the date of that financial statement of the Bahamas Bank is what? A. November 1, 1972.

Q. So that would be the day after the date of acquisition which is reflected on that statement, is that not true? A. That is true.

Q. So in effect that statement is the statement of the bank the day after it went into business after leaving its predecessor bank, the Farmers & Merchants Bank of Canada, is that correct? A. That is correct.

Q. So did you on May 25, 1973 have any way of knowing whether or not the transfers that were the subject of that note, the assets and deposits of the predecessor bank had been made to the Bahamas Bank? A. No, I had no knowledge.

Q. So so far as you knew based upon that statement at that time it could have happened, is that correct? A. Yes, it could have.

[153] Q. In other words, so far as you knew that note may no longer have been applicable as of May 1973, is that correct? A. That is correct.

Q. If that had been true would that have changed your opinion as to the condition of the bank, the Bahamas Bank? A. I would have consulted with my financial people and rendered a decision.

Q. And made a decision? A. Yes.

Q. But it would have changed your opinion as of the

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reading of that statement, is that correct? A. It would have lent some weight to it.

Q. Some weight in favor of the substance of the bank, is that correct? A. Yes, sir.

Q. Did you yourself or did you authorize or direct anyone on behalf of Aid Auto Stores to contact the Farmers & Merchants Bank in Canada in order to ascertain the truth or the status of that matter, the matter of the transfer of deposits? A. No, I did not.

Q. Did you yourself or did you authorize or direct [154] anyone on the part of Aid Auto Stores to contact the Bahamas Bank in connection with that matter? A. No, I did not.

Q. Mr. Klein, there came a time when you did learn that a \$50,000 loan or two \$25,000 loans had been made to Mr. Rittmaster and Mr. Lawrence, is that correct? A. That is correct.

Q. You were informed—

The Court: By the Bahamas Bank.

Q. You were informed by the Bahamas Bank; is that correct? A. By Mr. Davies of the Bahamas Bank.

Q. In response to being advised of that fact, did you ever make any attempt to have Mr. Rittmaster or Mr. Lawrence immediately repay those loans in order to get the certificate of deposit cancelled on your behalf, on behalf of Aid? A. Well, I turned it over to our legal department.

The Court: That's a simple question. Read the question again and listen carefully.

(Question read)

A. No.

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Q. Did you ever consider or propose that Aid [155] Auto Stores pay that loan, obtain whatever money you could from the—

The Court: You may not agree with me, but I am presiding and you will have to make up your mind that this is a judge who is pretty hard to handle. You may say anything you wish, but you are going to do it. I insist on loans being constantly recapitulated when you suddenly initiated an inquiry, at least make it perfectly clear what loan you are talking about, even though it is repetitious. That's what I find the jury needs.

I find later on that they send me notes and many times they don't know what's been going on.

Mr. Youtt: Thank you, Your Honor. It's advice well taken. I have been trying to hurry things along.

The Court: Don't. I am not hurrying you. All I want to do is save unnecessary waste of time, but this is an essential in the trial of a case and both of you are good. If I am picky it's because I think that you both can constantly be excellent.

Mr. Youtt: Thank you, your Honor. I appreciate it.

The Court: You have the capacity to be that.

Mr. Youtt: Thank you.

[156] Q. Did you, in connection with your efforts to obtain the money, whatever deposits you had made with the Bahamas Bank, ever consider or attempt to repay the loan that your director and his partner had obtained from the Bahamas Bank in order that you could recover whatever money you could get back from the bank? A. No. Because—

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The Court: He didn't ask you why. Please.

The Witness: No.

The Court: Next question.

Mr. Youtt: Thank you. I have no further questions at this time.

The Court: Anything further, Mr. Lee?

Mr. Lee: Yes, your Honor, very briefly.

Cross Examination by Mr. Lee:

By Mr. Lee:

Q. When was the certificate of deposit to mature? A. October 13, 1973.

Q. Did you confer with anyone as to whether you could take any action prior to the due date to have that money returned to you? A. Yes, I did.

Q. With whom? A. Basically with Mr. Davies, with Mr. Schweitzer, [157] with Mr. Rittmaster, with Mr. Biegen.

Q. Did any of those persons tell you that you could get your money back prior to October 13? A. Yes. Mr. Davies did.

Q. What did he tell you? A. He told me that I could have early retirement upon forfeiture of any accrued interest and a penalty of one percent.

Q. Did you attempt to get such early retirement? A. Yes, I did.

The Court: You covered all of that on the direct and you did it meticulously.

Q. Mr. Klein, when Rittmaster conferred or advised with you and the board of directors, did you depend upon and rely upon his full and complete loyalty? A. Yes, I did.

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Mr. Lee: No further questions.

The Court: Anything further now, Mr. Youtt?

Mr. Youtt: Nothing further.

The Court: I am going to tell Mr. Klein he can go back to his operations. Certainly he can leave the courthouse.

The Witness: Thank you.

The Court: Go right ahead, unless you wish [158] to stay. Of course you are welcome to.

If you stay you recognize they might put you on the stand again.

The Witness: I would like to stay, your Honor.

(Witness excused)

Mr. Lee: If the Court please, at this point I am going to offer some exhibits which have heretofore been marked.

The Court: And agreed upon?

Mr. Lee: I don't know that my adversary will agree that they will go in, but I will see—

The Court: I thought you people were going to discuss these things in advance of the trial.

Mr. Youtt: I object to the introduction of these at this time, your Honor.

The Court: All right, will you mark them for identification, Mr. Clerk.

(Plaintiff's Exhibit 7 marked for identification.)

The Court: Exhibit 7 for identification is objected to by counsel for the defense. All right, now was there another paper you wished marked for identification at this time?

[159] Mr. Lee: Yes, your Honor.

Mr. Youtt: I object also to this.

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The Court: Very well, will you mark that one, please, Mr. Clerk.

(Plaintiff's Exhibit 8 marked for identification.)

The Court: At a later time, without holding up the jury, we can discuss your respective positions as to Exhibits 7 and 8 for identification. Those are propositions of law with which the jury has no concern.

Mr. Lee: I think, your Honor, it might be somewhat provident if we could have a brief discussion without the jury present in connection with these specific exhibits and in connection with testimony which I intend to introduce.

The Court: Very well. Ladies and gentlemen, will you be good enough to excuse us.

(Jury not present)

The Court: First let's deal with 7 and 8 for identification.

Why do you think they are admissible in evidence, Mr. Lee?

Mr. Lee: Exhibit 7, your Honor, is a memorandum from Mori Aaron Schweitzer to Herb Cannon which has been [160] identified by Mr. Cannon in the testimony and I would propose—

The Court: In his testimony?

Mr. Lee: In Mr. Cannon's testimony and I would propose the following procedure as being the most expeditious way of handling perhaps a half dozen exhibits, namely to put Mr. Milan on the stand—

The Court: I know what you intend doing. You already outlined it. It's a very common practice.

Mr. Lee: Yes. The jury might not be familiar with it, but—

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The Court: Mr. Lee, I will take care of that. Just answer my question.

Why do you say 7 for identification should be admitted into evidence? That's all.

Mr. Lee: Because 7 for identification is a memorandum which transmitted two checks in the amount of \$25,000 each to Mr. Cannon personally, whose secretary then wrote "\$25,000—"

The Court: Cannon's secretary?

Mr. Lee: Yes. "\$25,000 Rittmaster, \$25,000 Lawrence" and Cannon had these \$25,000 checks on the Nassau Bank physically delivered to Rittmaster so that he is tied in physically with the actual making of the loan [161] to these people.

The Court: What do you say, Mr. Youtt?

Mr. Youtt: At the point when that is developed as evidence in this case my objection as to relevance or as to the fact that it is just hanging would be removed, but right now it is not the appropriate time to offer it.

The Court: That is a very good observation. In other words, at the time it becomes relevant you do not feel you will interpose any objections to 7 for identification.

Mr. Youtt: Yes.

The Court: That should content you, Mr. Lee.

Mr. Lee: My thoughts, your Honor—I was hoping to mark a great many of these and then just proceed with the deposition testimony.

The Court: You already heard him. He said if you will be good enough to let it ride until the matter is taken up in the deposition then he will not object to it. I certainly think, if I may say, gentlemen, and when I left you last night you made me feel as though you were going to do exactly what I asked

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you to do. You were supposed to sit down with something like that and say "This is what I propose to do," saying Mr. Lee to his [162] opponent. "I propose to read the deposition of Cannon and in the course of it there are certain exhibits which I would like to have offered into evidence" and I thought you were going to get his okay. I thought he was going to say okay to everything that he felt he could approve.

Now, you know all the exhibits because you are pretty thorough in your preparation, Mr. Youtt.

Won't you rise when I talk to you and will you be good enough to answer the question. Are there any objections to any of these exhibits that were marked during the course of the Cannon deposition?

Mr. Youtt: I must say, I haven't gone over all of those exhibits.

The Court: You should have.

Mr. Youtt: I didn't know that he was going to offer them all.

The Court: Go ahead and do it now. I practiced law. I know what it takes. I have done it.

Mr. Youtt: I understand. Mr. Lee didn't tell me what exhibits he intended to introduce.

The Court: But you knew I was going to read the deposition.

Mr. Youtt: I didn't know which deposition. There are several.

[163] The Court: You didn't know he was going to read the Cannon deposition.

Mr. Youtt: I must say I didn't know that.

The Court: After all, it's your burden, Mr. Lee. You were going to read the deposition and you should take it up. I am not going to sit here while you do your homework. Now do it.

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Don't give me any of the fancy talk. I resent it, leading the judge to believe you will do it when you haven't done it. Come on into the robing room, both lawyers.

(Discussion off the record in the robing room.)

The Court: Mr. Lee, what does the plaintiff propose doing now?

Mr. Lee: Your Honor, I have conferred with my adversary and we have agreed upon the procedure whereby I will offer certain exhibits all together and then Mr. Milan will be placed on the stand and we will read the relevant portions of the deposition relating to those.

The Court: Very well.

Have you got those exhibits before you now, or the proposed exhibits?

Mr. Lee: Yes, your Honor.

[164] The Court: Are they acceptable to the opposition?

Mr. Youtt: They are, your Honor.

The Court: Mark them as one exhibit, Mr. Clerk. Hand it to the clerk, the whole batch.

Mr. Lee: Could I have them marked separately?

The Court: If you want to.

Mr. Lee: 7 for identification is now in evidence.

(Plaintiff's Exhibit 7 received in evidence.)

Mr. Lee: 8 for identification is now in evidence.

(Plaintiff's Exhibit 8 received in evidence.)

Mr. Lee: I offer a copy of a letter dated September 12, 1972 from Herbert S. Cannon to the Chase Manhattan Bank.

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The Court: There is no opposition and mark it in evidence.

(Plaintiff's Exhibit 9 received in evidence.)

Mr. Lee: I offer for identification only at [165] this time a copy of three handwritten sheets which as stapled the first of which has on the top of it the handwritten words "Nassau Bank."

The Court: All right, mark it for identification.

(Plaintiff's Exhibit 10 marked for identification.)

Mr. Lee: I offer in evidence as Plaintiff's Exhibit 11 a handwritten yellow page to which certain copied pages are stapled.

The Court: Is there any opposition to it?

Mr. Youtt: No, your Honor.

The Court: Very well, received.

(Plaintiff's Exhibit 11 received in evidence.)

Mr. Lee: I offer as Plaintiff's Exhibit 12 an undated handwritten letter on the stationery of Atlantic-Pacific Bank & Trust Company.

The Court: Any opposition?

Mr. Youtt: No, your Honor.

The Court: All right, received and mark it in evidence.

(Plaintiff's Exhibit 12 received in evidence.)

[166] The Court: It is the deposition of Mr. Cannon that you propose to read?

Mr. Lee: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, Mr. Lee has made reference on occasion, during his open-

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ing remarks and recently, that he wishes to read into this trial record the deposition of Mr. Cannon.

What is a deposition and why are they doing it this way? Why isn't Mr. Cannon called to the stand? These things must be passing through your mind and I like to have a jury understand what's going on because you are the ones who have to resolve the facts.

Years ago when a trial like this came on it would take pretty near three weeks, and why? Because there were no preliminary moves made by the lawyers in connection with the issues that might eventually find their way at the trial. A great deal of evidence may be of no value, so the law says "Examine in advance of the trial. Don't wait for the trial. Take all the testimony you need and separate the wheat from the chaff. You want to examine a witness? Examine him in advance. See what he has to say. You may adopt, you may not adopt, in whole or in part, what he reveals. It will save the time at the trial. It will save the jury's time and save [167] the judge's time. It will help delineate the issues that have to be resolved at the trial."

So that's exactly what took place here. Mr. Cannon was called as a witness and he was examined in one of the offices. His lawyer was there and he swore to the testimony that he gave at that time. So what counsel proposes to do is to read to you what Mr. Cannon said in the course of that examination.

Mr. Cannon could be called to the stand, but Mr. Lee has a right to say "I want to reveal what he said on another occasion, not what he is saying now. That's the reason I want to do it this way." He has got a perfect right to do it that way.

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Now, the fact that Mr. Cannon was asked questions at deposition don't automatically mean that that becomes admissible before me. I may very well decide that certain questions that were put to him are not admissible at trial. You understand, it's a sort of a fishing expedition when you conduct a deposition. You are searching for the truth and in that search a great deal of questions are asked that would never be admissible at trial. I don't know whether there is going to be objections or not, but counsel have gotten together and as I understand it the deposition of Mr. Cannon will now [168] be read and there really isn't much opposition by Mr. Youtt to what was revealed by that deposition, together with the exhibits that you saw marked just now. Those were papers that Mr. Cannon was confronted with and examined during the course of the deposition.

Have I made myself clear? All right.

Now, in order to do it in a way that will be palatable so that you don't have question, answer, question, answer, Mr. Lee will read the questions that were put to Mr. Cannon and his associate will read the answers that Mr. Cannon gave to those questions.

You understand? You will have two voices and it won't be monotonous and he won't have to say question and answer all the time.

Is that clear? Very well.

[169] Mr. Lee: Thank you, your Honor. Mr. Milan, will you take the stand.

Page 87—

The Court: May I ask you, Mr. Lee, please, if you don't mind, the acoustics are miserable here.

Mr. Lee: Page 87, Line 25:

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"Q. Mr. Cannon, I show you a further piece of paper which was delivered to us by your counsel with a printed caption at the top 'Memo, Mori Aaron Schweitzer,' addressed to Herb Cannon, 77 Water Street, N.Y.C., N.Y., subject, loan or possible loans, and addressed: 'Herb,' and ask you if that is signed by Mori Aaron Schweitzer? A. I believe that is his signature, yes.

"Q. Did you receive that memorandum? A. Yes, I did.

Skipping to Line 16 on Page 88:

"Q. In what appears to me to be a different handwriting at the bottom there is the word 'delivered 4/23/73.' I ask you if you recognize that writing.

A. That is my secretary's handwriting. Also it is her writing that refers to 25,000 L. Lawrence, 25,000 A. Rittmaster.

"Q. Do you know what this memorandum refers to addressed to Herb and signed by Schweitzer? [170] A. Yes.

"Q. What does it refer to? A. It refers to Mr. Schweitzer forwarding to me to forward to Mr. Rittmaster and Lawrence two \$25,000 checks which were included, which were loans that they had taken from the A & P Bank.

"Q. What was the occasion for such checks having been sent out? A. I don't know why he sent them to me rather than sending them direct, but he just did.

"Q. You knew at that time, did you not, that these loans were being made by Messrs. Rittmaster and Lawrence? A. Yes, I did.

"Q. When did you first learn that these loans were

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being made? A. Some time early. I don't recall any dates.

"Q. With whom had you discussed such loans? A. Mr. Rittmaster, Mr. Lawrence and with Mr. Schweitzer.

"Q. Were those discussions in person? A. I don't believe so, no.

"Q. But you are sure that you had discussed it with Mr. Lawrence and with Mr. Rittmaster? A. I believe I discussed it with both of them. At [171] least one of them, but probably both of them.

"Q. Did you at that time notice the nature of the loans? A. I believe they were to be unsecured.

"Q. That was your belief at the time you discussed it, is that correct? A. That is correct.

"Q. When was your first discussion with anybody about the subject of the purchase by Aid Auto, the plaintiff in this action, of a certificate of deposit in the A & P Bank? A. When it was first discussed?

"Q. Yes. A. I don't recall any exact dates.

"Q. With whom did you first discuss it? A. Mr. Rittmaster.

"Q. When was that, if you know? A. I still don't recall any dates. I would say a month or two before that C.D. was actually purchased, whatever that date was.

"Q. Is it your best recollection that you did in fact discuss it with Mr. Rittmaster before the certificate of deposit was purchased in the Atlantic & Pacific Bank? A. Absolutely.

[172] "Q. Do you know at or about the time the certificate of deposit was purchased that it was in fact purchased? A. Did I know?

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"Q. Yes. A. Yes."

Mr. Lee: At this time I would like to read Exhibit 7 to the jury.

Mr. Youtt: Your Honor, there are two additional questions that follow in the text that I would ask be also read.

The Court: Have you any objection, Mr. Lee?

Mr. Lee: No, I have no objection.

The Court: Please read them.

Mr. Lee: That was where?

Mr. Youtt: Page 91, Line 13.

Mr. Lee: I understand that counsel wants me to read beginning at Line 13.

The Court: Go ahead.

Mr. Lee: (reading.)

"Q. When that certificate of deposit had been paid for in the purchase, was that the subject of discussion between you and Mr. Schweitzer? A. No, I think I heard about it some time shortly after it was purchased. I didn't know the exact time of [173] purchase, but I knew they were working towards having it purchased. I found out about the actual closing of it some time thereafter. I don't recall exactly when."

Mr. Youtt: That is all.

The Court: All right.

Now, you remember during the course of the deposition there was an exhibit shown to Mr. Cannon. Now counsel wants to read it hereafter. Please do it when the document is referred to in the course of the deposition. Do it at that time so that the jury can keep the testimony and the pertinent document in its mind. That is when you do it.

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All right, read 7 to them now.

Mr. Lee: "Memo: Mori Aaron Schweitzer, 8383 Wilshire Boulevard, Suite 626, Beverly Hills, California, 90211. To: Herb Cannon, 77 Water Street, N.Y.C., N.Y. Subject: Loan. Herb—as discussed enclosed are the two (2) checks for R & L," and there follows in handwriting 25,000 L. Lawrence, 25,000 A. Rittmaster, and the signature below it "Mori Schweitzer," and what was originally penciled "Delivered 4/23/73."

Page 105, Line 14.

"Q. I show you two pages stapled together, one of which purports to be a copy of a check which is signed in [174] handwritten printing Atlantic-Pacific—I will ask you to read it yourself, Mr. Cannon—and by what I believe to be Mori Schweitzer payable to your order in the amount of \$100,000, dated November 17, 1972. I ask you whether that check was paid to you. A. It was.

"Q. Will you read the hand-executed printing above the signature of Mr. Schweitzer? A. Atlantic & Pacific Bank & Trust Limited, by Mori Schweitzer.

"Q. I invite your attention to the paper stapled to that memo Mori Aaron Schweitzer to Herb Cannon and ask you if you received that memorandum dated November 10, 1972. A. Yes, I did.

"Q. You will note that the date of the memorandum is November 10 and the date of the check is November 17. A. Right.

"Q. Can you account for that? A. Ask Mr. Schweitzer.

"Q. In any event did you receive the check? A. I received it on or about that time and deposited it

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in my bank and it cleared and I was very happy."

At this time I would like to read the memorandum.

The Court: From exhibit number?

[175] Mr. Lee: From Exhibit Number 8 in evidence.

The Court: Will you just read what is pertinent, please, right now because the jury will have it to examine to their heart's content at the right time. There is no use in burdening them right now with all the little things that don't mean much, but what is the heart of it that you wish to call to their attention.

Mr. Lee: This sentence. "As discussed I am enclosing herewith an Atlantic & Pacific Bank & Trust Limited check in the amount of \$100,000." Signed by Schweitzer.

The Court: Of course counsel on the other side understands that if there is anything that counsel wishes to call to the attention of the jury when an exhibit is read they have the right to do so.

Mr. Youtt: The date on that is November 17, 1972.

Mr. Lee: The date on the memo is November 10 and the check itself is November 17.

The Court: All right, next.

Mr. Lee: Line 22 on Page 106.

"Q. The \$100,000 check, Exhibit 8, is, I take it, the payment to you of the \$100,000 which you referred to in your discussion a moment ago of"—and I am interpolating here, your Honor, a previously marked exhibit with the same **[176]** number in the deposition.

The Court: But actually that document has been marked as what in this trial?

Mr. Lee: It has not yet been marked, but it will

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be the next in order. Yes, it has, excuse me. By coincidence it is Exhibit 9 in evidence, which is the same number it had on the deposition."

"Q. The \$100,000 check, Exhibit 8, 9, I take it, the payment to you of the \$100,000 which you referred to in your discussion a moment ago of Plaintiff's Exhibit 9, is that correct? A. It is repayment to me of the \$100,000 that I advanced to the Canadian Bank for the purpose of the charter."

The Court: For the purpose of what?

Mr. Milan: Charter.

The Court: Charter?

Mr. Milan: Yes, sir.

"Q. From your examination of the bank's records in Nassau on or about March 2, 1973, you determined that the \$100,000 had been paid by the bank itself, did you not? A. Yes."

Page 104, Line 19.

"Q. I now show you a copy of a letter dated September 12, 1972, purportedly signed by you to the Chase Manhattan [177] Bank in Brooklyn, addressed to Mr. Calandra, requesting a transfer from your accounts of \$100,000 to be wired to McLeod Dixon Trust account and ask you whether you sent that letter. A. Yes, I did.

"Q. Was \$100,000 transferred from your account? A. Yes, it was.

"Q. Was that the \$100,000 to which you have previously referred in your testimony? A. To the Canadian Bank, yes."

Page 47, Line 12.

"Q. In your office or in your home or somewhere you must have a piece of paper writing or more

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which bears the name Atlantic & Pacific Bank & Trust Company, do you not? A. Yes, sir, I do.

"Q. What is the nature of the paper or papers that you have referring to it? A. I have several papers. One I know is a Xerox copy of the charter. I presume it is still there. Some correspondence, letters, a report of an examination I made when I went down there.

"Q. When did you go down there? A. Beginning of '73. I think it was in February.

"Q. What was the occasion for your going down there? [178] A. I wanted to see it. I wanted to take a look at the books.

"Q. When you say see it you usually see a bank by looking at an edifice or a building of some kind, do you not? A. Yes.

"Q. Is there any edifice or building? A. The bank was located in a store equivalency, if you will. Off the record."

Mr. Lee: Read the next answer.

"A. It is in one of the older Bahamian Hotels.

"Q. Is that hotel made of wood or stucco? A. I believe it is made of stucco.

"Q. And it is pink? A. It was pink at the time.

"Q. And you have a clear visual picture of that building? A. I think it is called Grand Bahamian, but I am not sure. It is not the Grand Bahamian, it is the British Colonial Hotel.

"Q. Is there an office occupied solely by what I will call the A & P Bank? A. There was an office. There was a safe. There were employees and it looked like any little branch office [179] of a bank you might see in a suburb area in the States.

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"Q. I take it from what you tell me that this differed somewhat from a simple corporate registry which one sees in the Bahamas of a simple metal plate or a wooden plate hanging outside of a frame building and that was a designated office. A. It was a nominee bank. It was a real facility, an operating bank.

"Q. Who were the employees of the bank when you made your visit? A. I don't recall. There were a couple of girls there and a managing director, whatever you call them in the Bahamas. I don't recall his name.

"Q. You said there was a safe. A. Yes.

"Q. What kind of a safe? A. A big kind.

"Q. Was it a walk-in safe? A. No. No. But it was five, six feet tall and about four feet wide.

"Q. On what floor of the building was the bank? A. Ground floor.

"Q. Who had the combination to the safe? A. I don't know.

[180] "Q. You stated that you examined the books of the bank. A. Yes, sir.

"Q. What were the books of the bank? A. A set of statement books like you would expect to see, accounting ledgers listing the mortgages that they held, the payments, who was behind, who was current, the loans outstanding.

"Q. Was there a journal? A. It was in the form of a journal.

"Q. Was there a ledger? A. Yes.

"Q. Did you see any income statement of the bank? A. Not while I was there, no, sir.

"Q. Did you see any statement of assets and liabilities? A. I didn't see a statement of assets and

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liabilities but the journals would necessarily add up, assuming they were correct assets and liabilities.

"Q. Is it your testimony that you in effect examined the subsidiary evidentiary working books of the bank rather than any conclusion as taken from those and translated into either an income statement or a balance sheet? A. No, not exactly. I used the working books.

【181】 "Q. Were those books looseleaf or were they bound? A. Both, I believe."

Skipping to Page 91, Line 22.

"Q. Mr. Cannon, I show you three sheets of paper which were delivered to me by your counsel. The top handwritten words are 'Nassau Bank' and these particular copies are on long paper and consist entirely of handwriting. I ask you whether these handwritten notes are the notes you made in your personal examination of the bank in Nassau. A. Yes, they are.

"Q. Do those constitute all of the notes that you made at that time? A. Yes. they do."

I offer in evidence Plaintiff's Exhibit 10 for identification.

Mr. Youtt: I have no objection.

The Court: There is no objection. Mark it in evidence.

(Plaintiff's Exhibit 10 was received in evidence.)

Mr. Lee: Page 75, Line 22.

"Q. I notice you do not have Plaintiff's Exhibit 11 before you now since it is being copied, which is the handwritten notes of your secretary as to your ap-

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pointments, [182] but a moment ago off the record when you were thumbing through those dates and permitted me to look over your shoulder, did that in any way refresh your recollection? A. As regards to those meetings?

"Q. That is correct. A. I recall the context of a few of them, yes.

"Q. What is it that you recall by looking at those pages from your diary? A. As I stated last time, the first meeting with Rittmaster & Lawrence, the dinner meeting, was to sort of bury the hatchet between Mr. Rittmaster and myself.

"Q. The date of that was December 5? A. I believe so, yes. At least at one of the meetings that Mr. Lawrence came to my office we talked about doing general brokerage business together and making markets in stocks that they were involved in and things of that nature. The possibility of it I should say. One meeting with Mr. Schweitzer and Mr. Generale and Mr. Wooldridge, whenever that was, some time the following year, which was to introduce me. That was the only time I met Mr. Wooldridge and the only time I met Mr. Generale, but to discuss the future and the problems and so forth of the bank in a general way. I think that second meeting with Mr. Schweitzer, that was indicated at some attorney's office also to take [183] exception what I just said was attended by Mr. Generale. I saw Mr. Generale twice. I think he showed up at that meeting."

Skiping over to Page 78, Line 9.

"Q. This meeting that you are referring to took place on April 6, 1973. A. I don't have a calendar in front of me, but it sounds as it could be.

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"Q. How was that meeting arranged? A. Mr. Schweitzer, I believe, called me and told me that he was in town with Mr. Generale and would I meet him uptown just to discuss things.

"Q. What was your interest in the bank at that time, the A & P Bank? A. The interest was seeing it become a success so that it would afford an opportunity for myself. I had no financial interest in it at that point, if that is what you are asking. I did have a very strong rooting interest for a bunch of reasons, all of which I am sure you have the records for.

"Q. What were your rooting interests for the bank? A. I had the option of sharing equally with Mr. Schweitzer and all participation in the bank as per our [184] agreement. This was given to me in exchange for my helping the initial funding of the bank. Obviously I was interested in seeing the bank be a success."

Dropping down to Line 25 on Page 79.

"Q. When you say an option, Mr. Cannon, to share half and half with Schweitzer, does that mean that you were to have half and Schweitzer was to have one-fourth and Generale was to have one-fourth? A. What I meant was that subject to giving any pieces to any outsiders that we would each share equally in the stock ownership with the bank. What Mr. Schweitzer did with his half of what was left and what I did with my half was our own business, but I would presume that his half would be split with Mr. Generale."

Skiping down to Line 15.

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"Q. Trying if I may, now that we have the papers in front of us with dates, to go back to your chronology, Mr. Cannon. The December 5 dinner meeting was the meeting which you have earlier characterized as the meeting to bury the hatchet, is that right, with Mr. Rittmaster? A. Yes. I believe that was the date."

Skipping over to Page 81, Line 9.

"Q. Mr. Cannon, looking at Plaintiff's Exhibit 11, when was the next date that you personally saw either Mr. [185] Lawrence or Mr. Rittmaster? A. January 3. I had lunch with Mr. Lawrence.

"Q. Will you look at the original of your diary for that date and see if you can tell from that writing where that luncheon was held? A. It refreshes my memory, yes. It was held in my office. I am almost positive.

"Q. How was that luncheon arranged? A. I really don't recall that.

"Q. What was the subject of conversation at that luncheon? A. About a situation regarding an over-the-counter stock and dealing with some people of Mr. Lawrence's in Florida or introducing it to them. Looking at the Florida note reminds me of that.

"Q. What is the next date on Exhibit 11 where you had any contact with Lawrence? A. February 8th I met with Mr. Lawrence and Mr. Rittmaster.

"Q. Where was that meeting? A. I don't recall, but I can look at the book and see if I can remember. We met at their office, 363 Seventh Avenue.

"Q. Does your diary show what time of day that was? [186] A. 4:30 in the afternoon.

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"Q. What was the subject of that meeting? A. To the best that I can recall, it was strictly discussed regarding Wall Street situations having nothing to do with the bank. I think I met a couple of their head traders and some of the people in their office and we talked about market-making and underwritings and things like that. I would like to add that there was, as I recall now, that there was some discussion regarding the Atlantic & Pacific Bank at that time and what possibilities or opportunities it might offer either of us or both of us. I believe that was the first time that the discussion ever came up or any mention of the bank came up was at that meeting."

Mr. Lee: The plaintiff rests.

The Court: Will you take the jury for just a few minutes.

(Jury left the courtroom.)

The Court: Motions?

Mr. Youtt: Yes, your Honor.

At this time I would like to make a motion to dismiss or direct a verdict pursuant to Rule 50A of the Federal Rules of Civil Procedure on the grounds that the plaintiff has failed to establish a prima facie case from which [187] reasonable minds could infer the necessary elements of the counts of the complaint, certainly the counts of the Securities Law matter which have not really been approached and emphasized at all, and in the area where Mr. Lee emphasized on his opening statements, that being the area of what he referred to as commercial bribery.

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There is no evidence in this record from which a jury can conclude that Mr. Cannon intentionally induced Mr. Rittmaster or anyone to violate duties that they owed to Aid Auto Stores. Mr. Rittmaster's duties were not exclusive to Aid Auto Stores. He could have disclosed whatever he was doing privately with the Bahamas banks. It was reasonable to assume that a director of a public corporation would do just that.

There is no indication from the evidence here that anything other than normal business relationships were taking place.

The fact that Mr. Rittmaster was also the financial consultant himself did not make him an exclusive agent of Aid Auto Stores so that he could not be dealing on his own behalf or on behalf of his investment firm. The fact is that in the very agreements themselves and in the prospectus there was contemplated that private compensation in the form of fees and commission would be paid by Aid [188] to Mr. Rittmaster's firm.

Clearly, if we are looking at the prospectus, there is a clear indication that just such private dealings on behalf of Rittmaster, Lawrence & Company in connection with the relationship with Aid were contemplated openly on the face of the record.

Now, Mr. Lee I think would have this Court send to the jury a question of whether or not on the issue of intent of Mr. Cannon should be chargeable with knowledge of the Aid prospectus.

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There is no evidence whatsoever that Mr. Cannon ever saw the prospectus or ever had anything to do with its contents. Merely because he was a sub-underwriter of I think some 15,000 shares of an over-\$100,000 share issue, he or his firm cannot be used to infer that Mr. Cannon himself knew any of the contents of that prospectus.

Furthermore, if he did know the contents of the prospectus, they are very ambiguous. It did not state that Mr. Rittmaster would be a director of the corporation, it merely said that the Rittmaster Company had a right to name a nominee in the future and stated they didn't have a present intention of doing so.

The Court: May I interrupt you. This is an occasion when counsel should be given time to present to the [189] Court the pros and cons of a motion so weighty.

I am going to excuse the jury. I have to see other lawyers up in chambers at 12:30, and I would therefore suggest that you prepare to the extreme whatever you want to say on the motion. I will give you time to do it, but when you do it that is it. I want it to be exhaustive because it is important and it is a motion that should be met head on in the light of the record.

It is either there or it is not. The Court has a right, according to high Courts' reaction and what I know it to be as a trial Judge, to look to lawyers, to marshal every piece of evidence, every scrap, to say nothing of nuggets of evidence to support or to refute the position taken by the parties.

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To that end I give you a reasonable amount of time without interruption by the Court to go forward and present everything that you wish.

Bring back the jury, please.

(Jury present.)

The Court: Ladies and gentlemen of the jury, the counsel join me in expressing appreciation to you for your patience and your understanding. You recognize that there are weighty questions of law that counsel have to advance to the Court and some of these things take time [190] and reflection. In the meantime you are kept waiting, but we are not playing a game and it isn't easy for any of us, but we have to do our duty. They have to do theirs, I have to do mine. It takes time is all I am trying to point out to you.

You run along to lunch and come back at two o'clock, please, on the dot, and we hope to be able to go forward at that time.

(Jury left the courtroom.)

The Court: Won't you please go forward now, Mr. Youtt. Continue your argument and I will give you another 15, 20 minutes at this time if you need it, and if you don't need it you may complete it at two o'clock. I want you to be given every opportunity and I want to afford that same courtesy to your opponent.

Mr. Youtt: Thank you.

Your Honor, if I may address myself first of all to Count 7 of the complaint. In Count 7 the plaintiffs allege that the defendant Cannon, among others

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—I guess the defendants Cannon and Cannon, Jerold intentionally or induced the breach of fiduciary relationships and contractual relationships between Rittmaster, Lawrence & Company and Arthur Rittmaster on the one hand and Aid Auto Stores on the other.

【191】 Now, in their trial brief they have presented their theory of this particular contention and have based it exclusively or very strongly on a section of the restatement of the law of agency duties.

Now, that section of the restatement, and I am going to quote directly from their trial brief, sets forth in Section 312, "A person who, without being privileged to do so, intentionally causes or assists an agency to violate a duty to his principal is subject to liability to the principal."

The Court: That appears on page?

Mr. Youtt: 9 of their trial brief.

Now, your Honor, the issue in this case is—there are several elements it would seem to me to proving that particular claim. The first would be that Mr. Rittmaster or Rittmaster, Lawrence did indeed breach fiduciary and/or contractual duties. I think from the evidence in this case, in all candor, certainly a prima facie case as to their breach of fiduciary duties—certainly Mr. Rittmaster's duty, the fact that he did not disclose has been established on this record.

So I don't think it is an issue—certainly it is an issue for the jury to decide and it is not one to take from the jury that there was a breach of duty on the 【192】 part of Mr. Rittmaster or Ritt-

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master, Lawrence & Company. However, it seems that the next thing that must be done, the next element that must be proven in order to hold Mr. Cannon liable is to show that Mr. Rittmaster or Rittmaster, Lawrence & Company was caused to breach its duty by something that Mr. Cannon did.

Now, this is where the record as it stands at this time has no evidence to support that theory of causes. The record as it stands at this time consists of the testimony of Mr. Klein, who never met nor had contact with Mr. Cannon, and the portions of the testimony of Mr. Cannon in his deposition and those documents which came in in connection with that testimony.

What is there in order to show that Mr. Rittmaster was caused by Mr. Cannon to breach his duty? The only evidence, I would suggest, your Honor, is the evidence that Mr. Cannon delivered after the fact on April 23, the payment having been made initially on April 3 and then repaid after the loss of the check on April 13.

Mr. Cannon paid or delivered two checks at the request of Mr. Schweitzer, and for what reason he did not know, to Mr. Rittmaster and Mr. Lawrence.

There is also testimony that was read from the [193] deposition of Mr. Cannon that he was aware that Mr. Rittmaster and Mr. Lawrence—or Mr. Rittmaster, at least, was dealing directly with the bank in an effort to place a certificate of deposit and that he had talked to Mr. Schweitzer about it. Further there is evidence that Mr. Cannon's relationship with Mr. Schweitzer was established by

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the fact, or at least for purposes of this trial, that Mr. Cannon had originally advanced moneys for the bank and had received them back in November of 1972 before any of these events happened.

Before the December meeting, before Mr. Rittmaster became a director or before anything else. I would suggest to the Court that these facts do not establish in any way evidence upon which reasonable minds could conclude that Mr. Rittmaster was caused by Mr. Cannon to breach his fiduciary or contractual duties.

So the causal link between whatever role Mr. Cannon had in this, as the evidence or as the record may show, and Mr. Rittmaster's breach of fiduciary duties is simply not there, for all reasonable minds to conclude, and this is something which I would suggest that the evidence more strongly supports, is that Mr. Rittmaster was dealing directly with the bank on numerous matters, or whatever other matters we don't know because they are not in the record, and if he breached his duty he did it either because he was [194] in the process of financial difficulties on his own or because he was dealing with other people, but not because of any dealings that he had with Mr. Cannon.

Even if the causal link were established, and I contend that there is just simply too cloudy a factual pattern to show that there was any causal link, even if the causal link were established, the next question is whether or not there is evidence in the record from which a jury could conclude that Mr. Cannon intended to induce Mr. Rittmaster to violate his duties.

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That intent, it seems to me, requires two elements, the first being knowledge of those duties and the second being actual intent.

Now, on the one hand knowledge, if proven, that Mr. Cannon knew that Mr. Rittmaster was a director, knew that Mr. Rittmaster's firm were special financial advisors under contract to Aid Auto Stores, Inc., they would show that then he could induce a violation of that. Certainly he couldn't intend to induce a violation of a relationship he didn't know exists.

What is the evidence that Mr. Cannon knew? Again, none from Mr. Klein because Mr. Klein had no contact with Mr. Cannon. The only evidence, your Honor, is the prospectus. The prospectus itself reveals that a right [195] to nominate a member of the board of directors was extended to Rittmaster, Lawrence & Company as part of the underwriting.

The prospectus also reveals that they had no present intention as of November 1972 of exercising that right.

Now, as a matter of fact coming from Mr. Klein we find that Mr. Rittmaster did become a member of the board of directors in January, January 25. That was after the December meeting and, at any rate, there is no evidence to show that Mr. Cannon was made aware of the fact that Mr. Rittmaster was a director and none from the testimony of Mr. Cannon that has been read into evidence by Mr. Lee in this case.

Furthermore, that prospectus, although it does reveal that a certain financial consulting agreement